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89-1083

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DONALD L. JACKSON and
PATRICIA V. JACKSON,

Petitioners,

v.

WESTERN FARM CREDIT BANK, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a policy of discouraging the writ process result in impairment of the Supreme Court's historical and constitutionally-mandated power of judicial review.

II. Is writ of mandamus the sole State Court and Federal Court vehicle for the appeal process respecting expungement of a lis pendens.

III. Are monetary damages for Farm Credit System lenders' wilful violations of the Borrowers' Rights provisions of the Agricultural Credit Act of 1987 a realistic alternative to the writ process.

IV. Are there any administrative remedies available to victims of Farm Credit System abuses

respecting the Right of First Refusal provisions of the Agricultural Credit Act of 1987.

V. Are the appellate courts abandoning the historic Supreme Court mandate that court processes be available to parties when their Congressionally-mandated rights are being violated and there is no administrative process available to address the wrongs.

VI. How does the conflict in the Circuit Courts result in discriminatory practices, denial of equal protection of the law, denial of free travel and commerce, denial of due process of law.

VII. Whether there is an implied private right of action for "previous owners" to enforce the Right

of First Refusal mandatory procedural requirements as set forth in Section 108 of the Agricultural Credit Act of 1987. Those provisions require that Farm Credit System (FCS) lenders:

Within 15 days after FCS first elects to lease or sell real estate acquired through foreclosure ("acquired real estate"), the FCS shall notify the "previous owner" of said "acquired real estate" of the previous owner's Right of First Refusal to -

(a) Purchase the property at the appraised fair market value of the property, as established by an accredited appraiser (mandatory sale); or,

(b) Offer to purchase the property at a price less than the appraised value (permissive sale);

(c) In the event the offer of the previous owner (permissive sale provision) is rejected by FCS, then FCS shall not sell the property to a third person at a price equal to or less than that offered by the previous owner or on different terms and conditions than those that were extended to the previous owner by FCS without first affording the previous owner the opportunity to purchase the property at such price or under such terms and conditions.

Section 108, Pub.L.No. 100-233, 12 U.S.C.§2219a (West Supp. 1989). (See App. A, pages 2a-6a.)

A direct conflict exists on this question between numerous District Courts and the United States Courts of Appeals. Most notably, the decisions in Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989) (App. G, p. 76a) and Zajac v. Federal Land Bank of St. Paul, 887 F.2d 844 (8th Cir. 1989), (App. F, page 48a).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Donald L. Jackson and Patricia V. Jackson (the Jacksons) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-titled proceeding on January 12, 1990 (See App. B, page 15a).

OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. B, p. 15a) is unreported. That ruling held that a private right of action is not available to "previous owners" of "acquired real estate" held by a Farm Credit System lender to enforce procedural requirements imposed upon Farm Credit System lenders under §108 Agricultural Credit Act of 1987, P.L. 100-233, 12 U.S.C.A. §2219a (West Supp. 1990) (See App. A, p. 1a). The United States District Court for the Eastern District of California Honorable Robert E. Coyle ruled in May 1989 that the Jacksons had an implied right of private action to enforce their right of first refusal to reacquire farm properties they had been foreclosed off.

Judge Coyle followed the reasoning and precedent set forth in Harper v. Federal Land Bank of Spokane, et al., 692 F.Supp.1244 (D.Or.1988). The Ninth Circuit Court of Appeals reversed the District Court's decision in the Harper case on June 27, 1989 (App.G, p.76a) and based on that decision Judge Coyle in the Jackson case granted a motion to dismiss all the Jackson's causes of action that related to their right of first refusal to repurchase their farm property. This decision resulted in the Jacksons' lis pendens being expunged because their complaint no longer affected title or possession of land.

JURISDICTION

The unpublished opinion of the court of appeals was entered on January 12, 1990. The Jacksons' Petition for

rehearing was denied February 20, 1990. (App. C, p. 32a). The court's jurisdiction is invoked under 28 U.S.C. §1254(1). Jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343. Jurisdiction of the court of appeals was invoked under 28 U.S.C. §1292(a)(1).

STATUTORY PROVISION INVOLVED

Appendix A at page 1a sets out relevant portions of the Agricultural Credit Act of 1987, Pub.L.No. 100-233, 12 U.S.C.A. §2219a (West Supp.1989).

STATEMENT OF THE CASE

The Agricultural Credit Act of 1987

The Agricultural Credit Act of 1987 (The Act), Pub. L. No. 100-233, included a totally new statutory creature commonly referred to as "the Right of First Refusal." The Congressional intent when this provision was incorporated into

The Act was to provide the hundreds of thousands of foreclosed farmers the opportunity to repurchase their homes and farms. The Act included a comprehensive and detailed overhaul of the loan-making and loan-servicing requirements of the federally created and chartered Farm Credit System (FCS). The Act also authorized an infusion of approximately $4 billion into the troubled System to buoy up its cooperatively owned lending institutions and to prevent further losses to the farmer/shareholders who own those institutions. In all, The Act represents the most complete and intrusive Congressional intervention in Agricultural Credit since the Great Depression.

Western Farm Credit Bank and the Federal Land Bank Association of Sacramento (hereafter "Bank") violated the Congressional spirit and intent of the law under the Agricultural Credit Act of 1987 by intentionally and fraudulently depriving the Jacksons of the procedural requirements imposed on FCS by the r. . of first refusal provisions of The 1987 Act. A review of the significance, to the Jacksons and other similarly sit ated farm families, that the procedural requirements set forth in The 1987 Act be strictly adhered to by FCS completes the statement of the Jackson case and lays the groundwork for discussion on the seven questions posed above.

THE JACKSONS

Jacksons are a third generation farm family residing in Kingsburg, California. The Jacksons acquired a 21,000 acre ranch in 1983 referred to as the Liberty Ranch. The Jacksons farmed row crops such as cotton, wheat, safflower and barley on the Liberty Ranch.

Due to allegedly unlawful acts by their lender, Federal Land Bank, the Jacksons lost the Liberty Ranch and all their other farm properties to foreclosure in 1985 and 1986. During crop year 1988, Western Farm Credit Bank, (the successor in interest to Federal Land Bank) became record title owner of the Liberty Ranch. Throughout crop year 1988 Jacksons attempted to effectuate their right to purchase or lease the Liberty Ranch in accordance with their rights of first

refusal under Section 108 of The 1987 Act.

The Bank initially took the position that The 1987 Act did not apply to Jacksons, but finally, in late April 1988, Bank sent a procedurally fatal defective letter to Jacksons offering to sell the Liberty Ranch to Jacksons for $12,000,000 cash. Jacksons were aware the Ranch was being offered to others for approximately $8,000,000 (approximately 50% less than the price offered to Jacksons) and that the property was worth no more than that. Jacksons eventually received an M.A.I. appraisal reflecting a value of $7,750,000.00. (See App. H, page 89a).

In May 1988 Jacksons offered to purchase the Liberty Ranch for fair market value as established by an accredited appraiser and even offered to pay for the appraisal. Bank refused the offer and

Bank refused the offer and continued with its sale efforts to third parties for $8,000,000. In December 1988 Jacksons filed suit against Bank and recorded a lis pendens against the Liberty Ranch in order to preserve their rights to repurchase their farm property.

In California, the filing of a lis pendens under California Code of Civil Procedure §409, et seq., provides constructive notice that title and possession of land are in dispute and a third party purchaser cannot then cut off the equitable rights to ownership of the party recording the lis pendens (See App. M, page 169a).

For purposes of the Jacksons' petition to the Supreme Court, the applicable lis pendens Sections are C.C.P. 409, 409.1, 409.2, and 409.4 (See App. M, page 169a). C.C.P. §409 sanctions

recordation of a lis pendens if a lawsuit affects title or right of possession of real property. C.C.P. §409.1 provides for expungement of a lis pendens under certain circumstances and the court has the power to order that the prevailing party on a motion to expunge under Section 409.1 must post an undertaking to retain or expunge the lis pendens. C.C.P. §409.2 provides that expungement of the lis pendens forever removes any rights of the party recording the lis pendens to recover their property irrespective of the outcome of their litigation over title and possession of the property.

C.C.P. §409.4 provides that an order expunging a lis pendens "shall not be appealable." The only remedy available to the aggrieved party and the only remedy sanctioned under C.C.P. 409.4 is

a petition for writ of mandamus.

Jacksons prevailed on the initial motions brought by the Bank in March 1989 to expunge the lis pendens and then Jacksons posted a Five Hundred Thousand Dollar ($500,000) cash undertaking to maintain their lis pendens pending trial. However, based on the Ninth Circuit Court of Appeals decision in June 1989 on the Harper case (App. G, page 76a) the District Court in the Jackson case granted Bank's renewed motions to dismiss all Jacksons' statutory causes of action under The 1987 Act and then granted a motion to expunge the Jacksons' lis pendens because the Jacksons' action no longer affected title or possession of real property.

The Jacksons timely petitioned the Ninth Circuit Court of Appeals for a

writ of mandamus and succeeded in obtaining a restraining order against the expungement order. Additionally, the Jacksons brought motions to certify the District Court's orders for appeal purposes and simultaneously filed an appeal. The Ninth Circuit Court of Appeals denied the Jacksons' appeal (App. D, page 34a) and the District Court denied the Jacksons' motion for certification (App. E, page 36a). In denying the Jacksons' petition for mandamus (App. B, page 15a), the Ninth Circuit Court of Appeals largely relied on its ruling in the Harper case (App. G, page 76a) that there is no implied right of private action for farmers to enforce their borrowers' rights under the 1987 Act and further found that the Jacksons' petition for writ of mandamus failed to meet all five of the factors required

under Armster v. United States District Court, 806 F.2d 1347 (9th Cir. 1986) for issuance of a writ.

REASONS FOR GRANTING THE PETITION

QUESTION No. I. Does a policy of discouraging the writ process result in impairment of the Supreme Court's historical and constitutionally-mandated power of judicial review.

The Ninth Circuit Court ruling on the Jackson case (App. B, page 15a) was largely based on the incorrect belief that the Jacksons' writ of mandamus was being utilized as a substitute for appeal. The Court's decision in effect would deprive the Supreme Court of its power of timely judicial review and a general policy of denying writs would result in a nationwide chilling effect on all issues that require

an expeditious review by the Supreme Court.

The Ninth Circuit Court reviewed five factors to determine whether issuance of a writ in the Jackson case is an appropriate remedy. The five factors are analyzed in Armster v. United States District Court, 806 F.2d 1347, (9th Cir. 1986) and Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977).

The five factors are:

1. Whether the party seeking the writ has no other adequate means to obtain the desired relief.

2. Whether the Jacksons will be prejudiced or damaged in such a way as to be irremediable on direct appeal.

3. Whether the district court's order is clearly erroneous as a matter of law.

4. Whether the district court's order is an oft repeated error or manifests a pattern evincing a consistent disregard for the federal rules of procedure.

5. Whether the district court's order raises new, important or unique issues, generally of first impression. The above five factors can independently be found be in numerous cases, but the first case to collectively review all five factors was Bauman, supra. However, the court in Bauman stated that "rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." The court went on to cite four cases in which a writ of mandamus was granted. Clearly an overriding factor in each of those cases was the fact that

there was no adequate avenue for appeal. See Bauman, 557 F.2d 650, 655. It seems clear that the critical issue is a finding that the delay of review will not cause irreparable harm to any of the rights involved. A writ was denied in Catena v. Capital Industries, Inc., 543 F.2d 77 (Ninth Circ. 1976), only after the court concluded that failure to issue a writ "does not put anyone in a position which cannot be corrected on appeal after the final judgment. . . . Thus, delaying this appeal until after final judgment will cause irreparable harm to no one." Similarly, in Bauman, 557 F.2d 650 at 657, the court stated "if the District Court's order . . . is wrong, and if Bauman prevails on the merits, the error can be remedied on appeal without great difficulty."

In stark, contrast the Jackson case involves real property and the Court must follow California Code of Civil Procedure Section 409.4 which provides that:

> "An order granting or denying a motion to expunge a notice of pendency of action made pursuant to section 409.1 of 409.2 shall not be appealable."

The aggrieved party may, however, petition the appellate court for a writ of mandate. This is not a case where the writ has been used as a substitute for appeal as the court appears to believe. Writ reviews serves "a vital corrective and didactic function." Will v. United States, 389 U.S. 90, 107, 88 S.Ct. 269, 280, (1967).

In its January 12, 1990 ruling (App. B, page 15a), the Court properly concluded in implying the five factors of

Bauman that they "'are not susceptible of mechanical application' and are only 'the useful starting point.'' Bauman, 557 F.2d 650 (quoting In re Cement Anti-trust Litigation (MDL NO. 296), 688 F.2d 1297, 1301 (Ninth Circ. 1982 aff'd for lack of a quorum, 459 U.S. 1191 (1983)). The Court then concluded that the two factors appeared to weigh in the JACKSONS' favor but then concluded that the remaining three factors outweigh any hardships the JACKSONS may incur by the denial of a writ of mandamus. As previously stated however, not all five factors will generally be found applicable in any one case. As an example, there is no allegation that the District Court's order is part of a recurring pattern of similar and erroneous rulings by the same district judge. If

this had been the case, clearly a writ would be warranted and yet, the fact that this element does not exist does not preclude the issuance of a writ of mandamus.

QUESTION NO. II. Is writ of mandamus the sole State Court and Federal Court vehicle for the appeal process respecting expungement of a lis pendens.

The Bank has consistently taken the position both in court, out of court, and in its opposition papers that it intends to sell the Liberty Ranch to third parties and will not allow Jacksons to repurchase the Liberty Ranch. This fact was acknowledged by the Bank in oral argument before the Ninth Circuit and is referenced as Footnote #2 in the Court's January 12, 1990 Opinion (App. B, p. 15a).

C.C.P. §409.4 (App. M, p. 169a) dictates that a writ of mandamus is the sole appeal process available to the Jacksons. The District Court has refused to certify its decision (App. E, p. 36a) and the Ninth Circuit has denied the Jacksons' appeal (App. D, p. 34a). The only issues left in the Jacksons' case in the District Court , thanks to the Harper decision, is the monetary damages Jacksons suffered when the Bank intentionally interfered with the Jacksons' business relationship with the party leasing the Liberty Ranch from the Bank for crop years 1987 and 1988. The main focal point of the Jacksons' litigation, recovery of the Liberty Ranch, has been eliminated and simple monetary damages for wrongful interference with a lease relationship is a poor and

unacceptable substitute for the right to reacquire one's farm properties.

QUESTION NO. III. Are monetary damages for Farm Credit System lenders' wilful violations of the Borrowers' Rights provisions of the Agricultural Credit Act of 1987 a realistic alternative to the writ process.

As noted above, the Jacksons are a farm family and their adult children now farm with them. In addition, the Jacksons share in farming operations with their parents and their brothers. The Jacksons are, in effect, what this country is all about when one thinks of family farms in America. The Jacksons were defrauded out of the farm properties they spent a lifetime acquiring. Due to possible statute of limitation bars, the Jacksons may

prove to be foreclosed from even recovering any monetary damages for losses of their properties. After the foreclosures, the Jacksons were reduced to being tenant farmers.

The Bank hurriedly disposed of all the Jacksons' foreclosed on farm properties at tremendously discounted prices just prior to enactment of The 1987 Act. However, the alleged sale of the Liberty Ranch fell through after the effective date of The 1987 Act (January 6, 1988) and thereby paved the way for the Jacksons to reacquire at least one of their farm properties and re-establish themselves in farm ownership as opposed to being tenant farmers. For a farm family, monetary damages are not a suitable alternative to ownership of their farm property.

Additionally, monetary damages would not be available to the Jacksons in any event because the Harper decision, unless reversed, will foreclose Jacksons from all avenues of legal address against the Bank for violations of the Jacksons' rights of first refusal under The 1987 Act. In their January 12, 1990 Opinion (App. B, p. 15a), the Ninth Circuit Court incorrectly concluded "thus, while the Jacksons are not precluded from seeking a monetary damages remedy, there appears to be no other adequate means to prevent Farm Credit from selling the property prior to exhaustion of a direct appeal." This conclusion is doubly incorrect because, as noted above, the Jacksons are, in fact, precluded from money damages as a remedy and "the adequate means to prevent Farm

Credit from selling the property" is provided for in C.C.P. §409 and §409.4 (App. M, p. 169a). The "adequate means" is the writ of mandamus procedure dictated in C.C.P. 409.4.

QUESTION NO IV. Are there any administrative remedies available to victims of Farm Credit System abuses respecting the Right of First Refusal provisions of the Agricultural Credit Act of 1987.

The Harper case (App. G, p. 96a) decided by the Ninth Circuit Court is a case involving a Farm Credit System borrower seeking to enforce his debt restructure rights under 12 U.S.C. §2202a. A review of 12 U.S.C. 2202a, along with the Ninth Circuit ruling in the Harper case, will illustrate the tremendous statutory framework for administrative review, both within Farm Credit System and

Farm Credit Administration. A foreclosure proceeding cannot even be commenced until after various administrative procedures are complied with under 12 U.S.C. §2202a.

In stark contrast there are no administrative remedies at all for previous owners with grievances concerning violations of their right of first refusal privileges under 12 U.S.C. §2219a (App. A, p. 1a). The Jacksons' case is totally distinguishable from the Harper case and the reasoning applied by the court in the Harper case to deny an implied right of private action for farmers to enforce their rights under The 1987 Act is fatally defective when applied to the Jackson case. For example, if the Court in Harper intended for the Harper holding to apply equally to all provisions of The 1987 Act, then the Court in Harper overlooked the

adequacy standard for administrative remedies established in Cannon v. University of Chicago, (1979) 441 U.S. 677, 706. In Cannon, the Court stated that:

> "True, this court has sometimes refused to imply private rights of action where an administrative or like remedies are expressly available. (citations omitted.) But it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons in which it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute."

The Ninth Circuit in the Harper case largely based its Opinion that "borrowers" had no right of private action to enforce their rights under the Agricultural Credit Act of 1987 due to the administrative remedies the court perceived are available to "borrowers and on the administrative remedies the court perceived Congress believed was available to "borrowers".

In reviewing the Harper court's analysis of the four elements required to find an implied private right of action, as set forth in Cort v. Ash, (1975) 422 U.S. 66 the same reliance on the administrative remedies available to the borrower is evident. In fact, the Harper decision goes into extreme detail explaining the Farm Credit System administrative scheme which provides for credit review committees that are even chaired with farmer/ director representatives. The Harper decision then makes a thorough analysis of the complete Farm Credit System administrative process respecting debt restructure applications and then considers the availability of administrative remedies via the enforcement powers of the Farm Credit Administration as an additional safeguard for "borrowers"

seeking their debt restructure rights. Finally, as an additional borrower safeguard, the Harper court concludes that after borrowers have exhausted all the administrative remedies, then borrowers in some states may still have the right to utilize the borrowers' rights provisions of the 1987 Agricultural Credit Act as a defense against foreclosure in State Courts. This concept is apparently a permissible hybrid private right of action available in a few states.

However, nowhere in the Ninth Circuit opinion in the Harper case is an analysis made of the right of first refusal provisions of the Agricultural Credit Act of 1987 for "previous owners." The Jacksons contend that the Ninth Circuit analysis and decision in the Harper case relates only to the debt

restructure provisions of the 1987 Agricultural Credit Act and the same analysis will reach an opposite result when applied to the right of first refusal provisions of The 1987 Act.

Based on the Declarations of David Senter and Larry Mitchell (App. I, p. 124a) and the letters to Farm Credit Administration from Senators Boren, et al. (App. J, p. 156a) and Senator Grassley (App. K, p. 159a), it is an undisputable fact that there simply is no administrative process available to the Jacksons with Farm Credit Administration for purposes of enforcing the Jacksons' Section 108 rights of first refusal under the Agricultural Act of 1987. The Farm Credit Administration has repeatedly and nationally taken the position in numerous cases (refer to App. I, p. 124a and letter

from F.C.A. to Jacksons) that it will not become involved in the individual disputes of farmers with grievances against Farm Credit System lenders respecting their debt restructure and/or their right of first refusal rights under the borrower's rights provisions of the 1987 Agricultural Credit Act. To a large degree, the Ninth Circuit decision in the Harper case relies on the assumption that there is an administrative remedy, and there is an administrative process available with the Farm Credit Administration to assist farmers in enforcing their borrower's rights under the Agricultural Credit Act of 1987. On that issue, the Harper court may have been misled by the Farm Credit System proponents. Farm Credit Administration has been reduced to a purely regulator status respecting supervision and control

over Farm Credit System similar to the same regulatory function that federal bank regulators have over federal chartered commercial banks.

Farm Credit Administration will not intervene in an individual borrower's case and use its cease and desist powers nor will it use its powers to fine institutions and individual officers that are abusing their borrowers and depriving them of their rights under the 1987 Agricultural Credit Act.

The Ninth Circuit Court opinion in the Harper case sets forward administrative remedies within the Farm Credit System institutions in addition to those they believed were available through Farm Credit Administration and those administrative remedies are contained in the individual policies and regulations of the

Farm Credit System lenders and are set forward in the regulations under Debt Restructure of The 1987 Agricultural Credit Act.

In fact, the Ninth Circuit in the Harper case elaborately describes the administrative processes within the Farm Credit System which includes the right to file debt restructure applications, the right to appeal to Credit Review Committee hearings, the right to seek independent appraisals, the right to have a farmer on the Review Committee, and the right to utilize the debt restructure provision of the 1987 Agricultural Credit Act as a defense to foreclosure proceedings, etc. However, in stark contrast under Section 108 of the Agricultural Credit Act regarding previous owner's rights to reacquire their

foreclosed on properties under their rights of first refusal, there is no comparable "in-house" administrative process or appeal process within the Farm Credit System. In fact, there is no "in-house" administrative remedy at all available to a previous owner. Farm Credit System uniformly takes the position that the previous owner is not entitled to a copy of the appraisal utilized by Farm Credit System to determine fair market value, Farm Credit System lenders uniformly take the position that the previous owner must "take it or leave it" with no questions asked, if and when their foreclosed on property is offered to them for repurchase or lease.

In enacting the right of first refusal provisions of the Agricultural Credit Act, it is obvious that Congress

intended to create a very special and very specific right for previous owners of foreclosed on agricultural properties. Accordingly, "previous owners" are a very identifiable and very "special class." The intent was that the right of first refusal should be extended immediately to previous owners of required real estate in a clean, front-end offer based on a fair market value of the property as established by an accredited appraiser. It would be totally inconsistent with the creation of such specific and special rights and such a detailed procedural scheme as is set forward in the Mandatory and Permissive Sale provision of the right of first refusal section for Congress to have intended the statute to become a dead letter or to be ignored on a systematic basis. It would be an "odd and

perhaps dangerous precedent" to ascribe such a purpose to Congress. Pennhurst State School and Hospital v. Halderman, (1981) 451 U.S. 32.

The dissimilarity between the debt restructure provisions and the right of first refusal provisions of The 1987 Act dictate that the two provisions be considered as entirely separate pieces of legislation. For example, considerations peculiar to the rights created by the right of first refusal provision of the Agricultural Credit Act demonstrate that an implied private right of action is, in fact, helpful and necessary in achieving Congressional purposes.

Firstly, unique among all the rights created in the borrower's rights section of the 1987 Amendment to the Farm Credit Act, the right of first refusal is a

right of last resort. If the previous owner is unable to exercise the right of first refusal, the consequence is final - the land passes outside the control of the Farm Credit System into the hands of a third party, and any assertion of rights to that land is forever foreclosed. Thus, the potential for harm to the Congressionally-intended beneficiary of the right of first refusal is immediate and irreparable.

Secondly, the rights created in the right of first refusal provisions of the Agricultural Act of 1987 must be asserted in an extraordinarily short timeframe. When the right created is threatened, remedial action must be taken within fifteen (15) days. Where private rights must be asserted quickly in order to avoid irreparable loss, it is obviously

the court's, and not the much more cumbersome and unresponsive machinery of an administrative agency, that would be expected to vindicate those rights. As we have demonstrated above, there is no administrative agency remedy available to the Jacksons nor is there an administrative process within Farm Credit System for the handling of the Jacksons' grievances in regard to being abused or frustrated by the Farm Credit System lenders over their rights of first refusal to reacquire their farm property. For previous owners desiring to acquire their foreclosed on properties, there simply is no meaningful alternative to a right of private action to enforce their rights in a court of law.

A discussion of the issue of total lack of enforcement and response by

Farm Credit Administration must be included in this Petition. While the 1987 Agricultural Credit Act does contain cease and desist provisions, the evidence supports the fact that the Farm Credit Administration will never utilize that procedure for the purpose of enforcing borrower's rights. (See App. I, p. 124a, App. J. p. 156a, App. K, p. 159a). Clearly, the focus of the cease and desist procedures by Farm Credit Administration is on actions which might threaten the financial integriy of Farm Credit System institutions. Thus, temporary cease and desist orders can be obtained only where there is a threat to the financial soundness of the Farm Credit System institution. 12 U.S.C. Section 2262(a). Directors and officers can be suspended only if their violations of law (a) will result in

"substantial financial loss" or similar economic detriment or (b) demonstrate personal dishonesty. 12 U.S.C. Section 2164(a).

Procedurally, the cease and desist provisions are ill-suited to protection of rights such as the right of first refusal which must be asserted otherwise the subject property will be lost immediately. The only expedited procedure available requires a threat to the financial integrity of a Farm Credit System institution. 12 U.S.C. §2262(a). Though ordinary procedures involve (1) a notice of charges, (2) a hearing no sooner than 30 days after service of the notice, (3) issuance of an order some time following the hearing, (4) but the order itself does not become effective for 30 days. 12 U.S.C. §2261(a) and (b).

Accordingly, the right of first refusal provisions of the Agricultural Credit Act of 1987 could never be effectively vindicated under this administrative remedy procedural scheme (see Jarrett Ranches v. Farm Credit Bank of Omaha, Case No. 88-10117, Adversary No. 89-1001 (Bankr. Ct. S.D. August 16, 1989).

Moreover, there is case authority that the Farm Credit Administration's failure to employ their discretionary agency enforcement tool may not be subject to court review. See Heckler v. Chaney, 470 U.S. 821, 830-831 (1985). Borrowers have never obtained relief from the agency through the cease and desist power, and there is no reason to believe borrowers ever will obtain a court order requiring the agency to utilize its cease and desist powers on their behalf. For all the

above reasons, the cease and desist provisions in the Agricultural Credit Act are for borrowers, a totally illusory remedy and should not be relied on by the courts in making the Cort v. Ash four-element analysis.

A further distinguishing factor between the Harper case and the Jacksons' case is the fact that current legislative history of Section 108 of the Agricultural Credit Act of 1987 substantially differs from the legislative history of the debt restructure provisions of the Agricultural Credit Act. The House version of the right of first refusal was far less detailed than the Senate version and provided that each Farm Credit System lender should establish "a policy" governing sale or lease "under regulations of the Farm Credit Administration."

H.R. 3030 Section 4.14E(b). In contrast, §1665 was far more detailed and made no mention of Farm Credit Administration regulations. In preferring the Senate version, moreover, the joint explanatory statements of the Committee of Conference, H.R. Rep. No. 490, 100th Cong., 1st Ses. (1987), specifically noted that it was accepting the Senate's "more detailed procedure for implementing the right of first refusal." Id., at 177. Clearly, when Congress sets forth the substantive right and the detailed procedure in the United States Code itself, and does not even mention a need for agency regulation, there is a strong inference that Congress is doing what it says and is creating enforceable rights.

Section 108, the Right of First Refusal provision of the 1987 Agricultural

Credit Act is a brand new concept and a brand new statute with no legislative or judicial interpretations or statutory history and is completely distinguishable from the forbearance and debt restructure provisions of the 1971 Agricultural Credit Act as amended by the 1985 and 1987 Agricultural Credit Acts. The forbearance and debt restructure provisions of the Agricultural Credit Act of 1971 as amended has a long history of statutory and judicial review and action, none of which exists in the right of first refusal provisions of 1987 Agricultural Credit Act. Accordingly, the Ninth Circuit Harper decision in regard to the Cort v. Ash analysis arguably does not apply to the Jacksons' case, and therefore should not be controlling over the Jacksons' case.

QUESTION V. Are the appellate courts abandoning the historic Supreme Court mandate that court processes be available to parties when their Congressionally-mandated rights are being violated and there is no administrative process available to address the wrongs.

In Cannon v. University of Chicago, supra, and Resado v. Wyman, (1970) 347 U.S. 397, the Supreme Court established a uniform rule respecting the right to resort to the courts to enforce Congressionally-mandated rights. The rule is simple; the mere theoretical availability of administrative relief is not enough to deny access to the courts to enforce federally-created rights.

In its Opinion rendered January 12, 1990 (App. B, p. 15a), the Ninth Circuit

states it intended its Harper decision to extend to the entire 1987 Act and not be limited only to the debt restructure provisions of the Act.

The Jackson case is entirely and completely distinguishable from the Harper case. Although both cases involve Congressionally-mandated rights under separate provisions of the same Act, namely the Agricultural Credit Act of 1987. However, as noted above, the Jackson case arises under the mandatory sale provisions of 12 U.S.C. §2219a, whereas, the Harper case involved provisions relating to the restructuring of a distressed loan, which are codified at 12 U.S.C. §2202a. The similarities of these two cases end with the fact that each of the two above provisions was originally introduced in the same Congressional Act.

The proposition that an implied right of private action may exist under one provision of a Congressional act and not exist under a separate provision of the same Congressional act is well settled law. This proposition was recently affirmed and further defined by the Ninth Circuit Court of Appeals in In re Washington Pub. Power Supply Sys. Sec. Lit., 823 F2d 1349 (9th Cir. 1987).

The Securities Act of 1933, 15 U.S.C. §77q(a) hereafter (FTC Security Act), contains two similar provisions, commonly referred to as Section 17(a) and Section 10(b). The Supreme Court has recently affirmed that a right of private action exists respecting Section 10(b) of the Securities Act. See Herman & MacLean v. Huddleston, 459 U.S. 375, 380, 103 S.Ct. 683 (1983). However, in In re

Washington, the Ninth Circuit ruled that a right of private action does not exist under Section 17(a) of the same Act but the court noted that different provisions of the same Act could have different conclusions respecting whether a right of private action exists or does not exist to the various provisions that make up an Act.

These recent cases in the Supreme Court and the Ninth Circuit clearly establish that in applying the four elements set forth in Cort v. Ash, supra, to determine if a right of private action exists in a piece of legislation, opposite results may occur as to different provisions of the same legislation. This outcome is only logical because to hold otherwise would require Congress to pass separate Acts for each provision of

legislation.

When The 1987 Act was first introduced to Congress, Representative Jones went on record to state:

> "In summary, I want to let the System and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the System and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to insure that full advantage is taken of the provisions of the new law."
>
> H. R. 3030. 100th Cong., 1st Sess., 133 Cong. REC 11873 (December 18, 1987)

On May 6, 1987, Senators Pryor, Cochran, Fowler, and Sanford proposed the 1987 Act. Senator Fowler went on record to state:

> "I am particularly proud to be the sponsor of legislation that spells out a borrower's bill of rights. The borrowers in this system have been abused, misled, coerced by Farm

> Credit Administration banks and officials who have sought to remake this System along new lines, but to the detriment of local control and cooperative principles. To protect against such abuses in the future, the Bill provides borrowers with specific rights, including the following: . . . Borrowers have the right to sue in federal court any institution of the Farm Credit System for violating duties owed to the borrower. . ."
>
> S. 1156, 100th Cong., 1st Sess., 133 Cong. REC 6105 (May 6, 1987) at 6109.

There can be no other finding but that Congress created 12 U.S.C. §2219a of the 1987 Act (App. A, p. 1a) solely to benefit foreclosed off farmers and constitutes a fine effort to mitigate the fact that this nation lost a substantial part of one of its most precious natural resources over the previous six years, namely over 500,000 farm families. Section 12 U.S.C. §2219a has only one

purpose and that is to mandate that previous owners have an opportunity to repurchase their farm. The fact that the drafters of 12 U.S.C. §2219a were painfully aware of the shortcomings of Farm Credit System lenders is best illustrated from a discussion between Senators Daschle and Boren on October 14, 1987 during a session in the United States Senate Subcommittee on Agricultural Credit:

> "Senator Daschle: But in cases that you've described, where you have a contentious situation, and you have a local lender who just doesn't want to sell to that guy...
>
> "Senator Boren: He says I don't want that guy that I did business with back on that land again.
>
> "Senator Daschle: What prevents him from, very legally, setting that thing, arbitrarily, pretty high, and saying, 'take it or leave it?'
>
> "Senator Boren: It's hard for me to understand whatever motivated those

> people to have done that, but that one person I talked to directly, and I'm convinced that's exactly what happened. In fact, there were newspaper stories about him, offering the cash, took it right in, and they said no."
>
> U.S.C.A. 88-5202 N.D. (Oct. 14, 1988 Session).

Ultimately, the Senators believed they resolved the problem of how to assure that a previous owner would in fact be offered his property fairly by creating the mandatory sale, permissive sale and appraisal provisions that now form an integral part of 12 U.S.C. §2219a.

Extending the Harper holding to all provisions of the 1987 Act in effect destroys the 1987 Act just as effectively as the 1985 Agricultural Credit Act was destroyed by the same court holdings, namely that farmers could not bring an action in court to enforce their conressionally mandated rights.

their congressionally mandated rights.

The Jacksons are aware that Congress is outraged that Farm Credit System lenders are violating the spirit and intent of the 1987 Act. Congressmen and Senators are receiving thousands of letters from their constituents demanding action. It is an outrage that Farm Credit System lenders are disregarding the procedural requirements of the 1987 Act and frustrating that there is no available administrative remedy to correct it as evidence by letters from Senators to Farm Credit Administration and personal visits to Farm Credit Administration (See App I, p. 124a, App J, p.156a, and App K, p. 159a).

The Jacksons believe that the Bank's attorneys in opposing the Jacksons' petition to this court will be quick to

point out that Congressman Nagle introduced in early May 1990 H.R. 4732 (App L, p. 163a) a bill which will amend the 1987 Act to include an express right of private action for farmers to have the right to enforce their rights under the 1987 Act in courts of law. It is common knowledge that a companion bill will be introduced in the Senate by the end of May 1990. The Jacksons anticipate that their opposition will attempt to persuade the court that since it appears that Congress is going to address the right of private action issue anyway, then the court should not be quick to rule on the Jacksons' petition.

Whether Congress does or does not pass an amendment to the 1987 Act is not however, the issue. The issue is whether under the current 1987 Act as viewed by past Supreme Court decisions the Jacksons

have an implied right of private action to enforce their congressionally mandated right to repurchase their farm.

QUESTION NO. VI. How does the conflict in the Circuit Courts result in discriminatory practices, denial of equal protection of the law, denial of free travel and commerce, denial of due process of law.

There now exists a direct conflict between the United States Courts of Appeals for the Eighth and Ninth Circuits and numerous District Courts on the question of whether there is an implied private right of action for previous owners, borrowers and/or shareholders to enforce mandatory procedural requirements of the 1987 Act. In addition, the issue is awaiting decisions in the United States Court of Appeals for the Fourth

Circuit in Payne v. Federal Land Bank of Columbia, 711 F.Supp.851 (W.D.N.C. 1989), appeal pending, Record No. 89-1028 (4th Circuit), and in the United States Court of Appeals for the Tenth Circuit in Griffin v. Federal Land Bank of Witchita, 708 F.Supp.313 (D.Kan 1989) appeal pending.

This issue is also of extraordinary national significance. The Farm Credit System is a federally created agricultural lending system that is cooperatively owned by its 600,000 borrower-shareholders. Farm Credit System lenders, including the respondent Bank, extend approximately 30 percent of all agricultural credit in the nation, with a current total of over $50 billion.

Thus, because there is a direct conflict between two courts of appeals, and the question presented is one of

enormous national significance, the petition for certiorari should be granted. Rule 17 of the rules of the Supreme Court of the United States includes, among the considerations governing the court's discretion concerning review on certiorari:

> (a) when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;
>
> ...
>
> (c) when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court....

Here, both considerations are clearly present. In such cases, where there is both a conflict among courts of appeal and an important legal question, this court has exercised its discretion and granted review by writ of certiorari.

1989), and Jarrett Ranches, supra.

The conflict in the various circuit and district courts results in farmers being treated totally differently depending on which federal court district their farm happens to be located in. Farmers who cannot bring an action to enforce their rights are greatly disadvantaged. Farmers who can sue to enforce their rights are treated more fairly, receive better interest rate loans, their crop lenders and trade creditors have a greater comfort margin and accordingly, are more liberal in extending credit.

Where your farm happens to be located results in unfair competition, discriminatory loan practices from Farm Credit System lenders, an illegal restraint on free travel and commerce and constitutes a denial of equal protection of the law.

This is an intolerable violation of the basic constitutional rights this country prides itself in. To condone farmers in one state enjoying the benefits of their constitutionally mandated rights, which allows them to retain their ranches by enforcing debt restructure or enforcing a right to reacquire their farms and deny those same rights to farmers in a different state because of conflicting court holdings, is not acceptable in this nation.

QUESTION VII. Whether there is an implied private right of action for "Previous Owners" to enforce the right of first refusal mandatory procedural requirements as set forth in section 108, 12 U.S.C. 2219a of the Agricultural Credit Act of 1987.

A review of all the provisions of the 1987 Agricultural Credit Act will

demonstrate that section 108, right of first refusal, 12 U.S.C. 2219a (App. A, p. 1a) is totally devoid of any of the safeguards attendant to other provisions under the 1987 Act. There is absolutely no protections and no administrative remedies available to the previous owner, such as Jacksons when a Farm Credit System lender elects to be arbitrary, vindictive and violate the procedural requirements required under the right of first refusal provisions of the 1987 Act.

The Cort v. Ash analysis set forth in the Zajac case (App. F, p. 48a) resulted in a well reasoned opinion that an implied right of private action exists and is necessary for proper administration of the 1987 Act. The numerous district court cases wherein an

implied right of private action is confirmed, all rely on the Cort v. Ash analysis and all independently come to the same conclusion as the Zajac court. In the face of absolutely no available administrative remedies, the inescapable conclusion is that if no implied right of private action exists for previous owners to enforce their right of first refusal to repurchase their property, then Congress wasted its time and the taxpayers' money in drafting the right of first refusal provisions and the spirit and intent behind drafting the law, which was to curtail this nation's acceleration toward converting the nation's family farmers to tenant farmers, will not be realized.

CONCLUSION

The Jacksons in effect have over

$20,000,000.00 invested in the Liberty Ranch. The Jacksons hope to recover the Liberty Ranch and by farming the Ranch over future years offset a portion of the loss of their entire life savings and all their properties that were lost to foreclosures in 1985 and 1986.

The Jacksons made in excess of $5,000,000.00 in improvements to the Liberty Ranch after it was acquired. It is unconscionable to deny the Jacksons the right to maintain their lis pendens on the basis that they have no right of private action to enforce their rights to repurchase under the 1987 Act. Once the land is lost by a sale to third parties, the Jacksons can never recover the land.

The Jacksons have no other remedies available to them in law or equity

respecting expungement of the lis pendens other than to petition for a writ of mandamus and request that this court issue its writ in order that the status quo of the parties be maintained pending conclusion of the Jacksons' case on the merits.

This court should conclude that since there are no administrative remedies for previous owners seeking to repurchase their farm properties pursuant to their rights under the 1987 Act, that said

deficiency dictates a finding of an implied right of private action to conform to the United States Supreme Court decision in Cannon, supra.

Respectfully submitted,

May 21, 1990

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APPENDIX A

SECTION 108 OF THE AGRICULTURAL CREDIT ACT OF 1987, 12 U.S.C. §2219a

SEC. 108. Right of First Refusal

(a) General Rule

Agricultural real estate that is acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter in this section referred to as the "previous owner") who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter in this section referred to as "acquired real estate") shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section.

(b) Application of right of first refusal to sale of property

(1) Election to sell and notification

Within 15 days after an institution of the System first elects to sell acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right-

(A) to purchase the property at the appraised fair market value of the property, as established by an accredited appraiser; or

(B) to offer to purchase the property at a price less than the appraised value.

(2) Eligibility to purchase

To be eligible to purchase the property under paragraph (1), the previous owner must, within 30 days after receiving the notice required by such paragraph, submit an offer to purchase the property.

(3) Mandatory sale

An institution of the System receiving an offer from the previous owner to purchase the property at the appraised value shall, within 15 days after the receipt of such offer, accept such offer and sell the property to the previous owner.

(4) Permissive sale

An institution of the System receiving an offer from the previous owner to purchase the property at a

price less than the appraised value may accept such offer and sell the property to the previous owner. Notice shall be provided to the previous owner of the acceptance or rejection of such offer within 15 days after the receipt of such offer.

(5) Rejection of offer of previous owner

(A) Duties of institution

An institution of the System that rejects an offer from the previous owner to purchase the property at a price less than the appraised value may not sell the property to any other person-

(i) at a price equal to, or less than, that offered

by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to purchase the property at such price or under such terms and conditions.

(B) Notice

Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an offer to purchase the property at such price or under such terms and

conditions.

(B) Notice

Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an offer to purchase the property at such price or under such terms and conditions.

(c) Application of right of first refusal to leasing of property

(1) Election to lease and notification

Within 15 days after an institution of the System first elects to lease acquired real estate, or any portion of such real estate, the institution shall notify the previous

owner by certified mail of the owner's right-

(A) to lease the property at a rate equivalent to the appraised rental value of the property, as established by an accredited appraiser;

(B) to offer to lease the property at a rate that is less than the appraised rental value of the property.

(2) Eligibility to lease

To be eligible to lease the property under paragraph (1) the previous owner must, within 15 days after receiving the notice required by such paragraph, submit an offer to lease the property.

(3) Mandatory lease

An institution of the System receiving an offer from the previous owner to lease the property at a rate equivalent to the appraised rental value of the property shall, within 15 days after the receipt of such offer, accept such offer and lease the property to the previous owner unless the institution determines that the previous owner-

(A) does not have the resources available to conduct a successful farming or ranching operation, or

(B) cannot meet all of the payments, terms, and conditions of such lease.

(4) Permissive lease

An institution of the System receiving an offer from the previous owner to lease the property at a rate that is less than the appraised rental value of the property may accept such offer and lease the property to the previous owner.

(5) Notice to Previous Owner

An institution of the System receiving an offer from the previous owner to lease the property at a rate less than the appraised rental value of the property shall notify the previous owner of its acceptance or rejection of the offer within 15 days after the receipt of such offer.

(6) Rejection of offer of previous owner

(A) Duties of institution

An institution of the System rejecting an offer from the previous owner to lease the property at a rate less than the appraised rental value of the property may not lease the property to any other person-

(i) at a rate equal to, or less than that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity

to lease the property at such rate or under such terms and conditions.

(B) Notice

Notice of the opportunity described in subparagraph (A) shall be given to the previous owner by certified mail, and the previous owner shall have 15 days after the receipt of such notice in which to agree to lease the property at such rate or under such terms and conditions.

(d) Public Offerings

(1) Notification of previous owner

If an institution of the System elects to sell or lease acquired property or a portion thereof through

a public auction, competitive bidding process, or other similar public offering, the institution shall notify the previous owner, by certified mail, of the availability of the property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms and conditions to which such sale or lease will be subject.

(2) Priority

If two or more qualified bids in the same amount are received by the institution under paragraph (1), such bids are the highest received, and one of the qualified bids is offered by the previous owner, the institution shall accept the offer by the previous

owner.

(3) Nondiscrimination

No institution of the System may discriminate against a previous owner in any public auction, competitive bidding process, or other similar public offering of property acquired by the institution from such person.

(e) Term or condition

For the purposes of this section, financing by a System institution shall not be considered to be a term or condition of a sale of acquired real estate.

(f) Financing

Notwithstanding any other provision of this section, a System institution shall not be required to provide financing to the previous owner in connection with the sale of acquired real estate.

(g) Mailing of notice

Notwithstanding any other provision of this section, each certified mail notice requirement in this section shall be fully satisfied by mailing one certified mail notice to the last known address of the previous owner.

(h) State laws

The rights provided in this section shall not diminish any such right of first refusal under the law of the State in which the property is located.

(i) Applicability

This section shall not apply to a bank for cooperatives.

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

DONALD L. JACKSON;
PATRICIA V.JACKSON,

Plaintiffs-Appellees,

v.

WESTERN FARM CREDIT BANK,
et al.,

Defendants-Appellants.

OPINION

Appeal from the United States
District Court for the
Eastern District

Argued and Submitted December 12, 1989
Decided January 12, 1990

Before WRIGHT, HAS, LEAVY
Circuit Judges

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT

DONALD L. JACKSON; PATRICIA V.JACKSON,	) No. 89-70453
	) DC No.
Petitioners,	) CF-F-88-636-REC
	)
v.	)
	)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,	)
	)
Respondent,	)
	)
WESTERN FARM CREDIT BANK, et al.,	)
	)
Real Party in Interest.	) MEMORANDUM*

Petition for Writ of Mandamus from the United States District Court for the Eastern District of California
Robert E. Coyle,
District Judge, Presiding

Argued and Submitted December 12, 1989
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: WRIGHT, HUG, LEAVY, Circuit Judges.

Donald and Patricia Jackson (the "Jacksons") petition for writ of mandamus ordering the district court to reinstate a lis pendens. Alternatively, the Jacksons request a stay of the district court's order expunging the lis pendens pending exhaustion of their appeals.

We have jurisdiction to issue writs of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 (1982).[1/] Armster v. United States District Court, 806 F.2d 1347, 1351 (9th Cir. 1986). We deny the Jacksons' petition for writ of mandamus and deny the Jacksons' request

1/ California law also expressly authorizes an appeal by writ of mandate of a district court order granting a motion to expunge a lis pendens. Cal. Civ. Proc. Code § 409.4; see also id. § 409(a) (authorizing recordation of lis pendens in federal district court).

for a stay.

I. Writ of Mandamus

The Jacksons contend they are entitled to a mandamus remedy because the district court erroneously granted Western Farm Credit Bank's ("Farm Credit") motion to expunge their lis pendens. The district court expunged the lis pendens after dismissing the Jacksons' claims under the Agricultural Credit Act of 1987 (the "1987 Act"), 12 U.S.C. §§ 2001-2279aa-14 (1988).

A "writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133, 1143 (1988) (citing Kerr v. United States District Court, 426 U.S. 394, 402 (1976)). The federal courts have traditionally only used the

writ in exceptional circumstances where it is necessary "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Id. (quoting Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943)); Armster, 806 F.2d at 1351 (quoting Roche); Bauman v. United States District Court, 557 F.2d 650, 654 (9th Cir. 1977) (quoting Roche). The party seeking mandamus has the burden of showing that it has a "clear and indisputable" right to issuance of the writ. Gulfstream, 108 S. Ct. at 1143; Bauman, 557 F.2d at 662.

We consider five factors to determine whether issuance of a writ is an appropriate remedy. See Armster, 806 F.2d at 1351-52. These factors

are:

1. Whether the party seeking the writ has no other adequate means to obtain the desired relief.
2. Whether the petitioner will be prejudiced or damaged in such a way as to be irremediable on direct appeal.
3. Whether the district court's order is clearly erroneous as a matter of law.
4. Whether the district court's order is an oft repeated error or manifests a pattern evincing a consistent disregard for the federal rules of procedure.

5. Whether the district court's order raises new, important, or unique issues, generally of first impression.

Id. at 1352 (citing Bauman, 557 F.2d at 654-55). In applying these five factors, we note that they "'are not susceptible of mechanical application' and . . . only 'a useful starting point.'" Id. (quoting In re Cement Antitrust Litigation (MDL NO. 296), 688 F.2d 1297, 1301 (9th Cir. 1982), aff'd for lack of a quorum, 459 U.S. 1191 (1983)).

At the outset, we acknowledge that the first two factors appear to weigh in the Jacksons' favor. Although the Jacksons do not claim that a direct appeal is unavailable to them, the relief they do desire is specifically

related to halting the anticipated sale of the farm property once the lis pendens is expunged.[2/] Thus, while the Jacksons are not precluded from seeking a money damages remedy, there appears to be no other adequate means to prevent Farm Credit from selling the property prior to exhaustion of a direct appeal. This inadequacy of alternative relief is closely related to the second factor since a direct appeal would not allow the Jacksons an opportunity to repurchase the property once it is sold to a third party.

Nevertheless, the Supreme Court

2/ Farm Credit acknowledged both at oral argument and in its Opposition to Request for Continuation of Stay that, once the lis pendens is expunged, they would attempt to sell the property as soon as possible in order to avoid incurring further expected losses.

has cautioned "that the writ is not to be used as a substitute for appeal . . . even though hardship may result from delay . . . " Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (citations omitted). This guidance is in accord with our generaly policy of postponing appellate review until after final judgment has been rendered by the trial court. See Bauman, 557 F.2d at 653 n.4.

These general policies require us to balance these often conflicting factors in determining whether mandamus is warranted. See id. at 655. It is our conclusion that the remaining three factors relating to the district court's order sufficiently outweigh any hardships the Jacksons may incur by our denial of mandamus relief.

The district court dismissed the Jacksons' statutory claims in reliance on our recent opinion in Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989). In Harper, we held that there was no implied private right of action under the 1987 Act. Id. at 1173. Based on this ruling, the district court ordered the Jacksons' lis pendens on the property expunged.

The Jacksons do not contest Harper's validity, but rather contend it is distinguishable. Specifically, the Jacksons contend that Harper was limited to the debt restructuring provisions of the 1987 Act and is therefore inapplicable to the rights of first refusal at issue here.

Contrary to the Jacksons' contentions, there is no explicit indication

that our holding in Harper was not intended to apply to the 1987 Act in its entirety. Although only the debt restructuring provisions were at issue in Harper, we expressly framed the issue in terms o the entire statute. See id. Moreover, in joining other federal courts which have also rejected an implied right of action under the 1987 Act, we acknowledged and thereby implicitly rejected several contrary cases that recognized a right of action under the right of first refusal provisions of the Act. See id. at 1177.

Thus, the district court relied on recent and arguably controlling precedent in its decision to dismiss the Jacksons' statutory claims. We conclude, therefore, that the district

court's order was not clearly erroneous as a matter of law.[3/]

Nor has there been any showing that the district court's order was an "oft repeated error" or manifested "a consistent disregard for the federal rules." Armster, 806 F.2d at 1352. Finally, in light of Harper, the district court's order fails to raise

3/ The district court's order granting Farm Credit's motion to expunge the lis pendens was similarly not clearly erroneous since, in applying California law, a district court must expunge a lis pendens if the party recording the lis pendens fails to show, by a preponderance of the evidence, that the underlying action affects title to or right of possession of real property and that the recording party has commenced prosecuted the action for a proper purpose and in good faith. See Cal. Civ. Proc. Code § 409.1. (Emphasis added). Here, the dismissal of the underlying statutory claims eliminated any remaining interest the Jacksons held in the property.

"new, important, or unique issues, generally of first impression." Id.

After weighing these factors, we find that the Jacksons have failed to meet their burden. Along with the Supreme Court's direction requiring restraint in the use of extraordinary relief and our general policy of not using mandamus as an alternative to direct appeals, we conclude that the Jacksons have failed to establish that they have a "clear and indisputable" right to issuance of the writ. Gulf-stream, 108 S. Ct. at 1143; Bauman, 557 F.2d at 662.

II. Stay of Expungement Order

As alternative relief, the Jacksons request us to stay expungement of the lis pendens pending exhaustion of their

appeals.

The standard for evaluating stays pending appeal is similar to that used by district courts in determining whether to grant a preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir.), stay granted pending appeal, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers). Thus, the Jacksons are required to show both a probability of success on the merits and the possibility of irreparable injury. Id. The Jacksons must additionally demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in their favor. Id.

Many of the same considerations we employed in denying the Jacksons' writ compel us to also deny any further stay of the expungement order. Although the

relief sought by the Jacksons may be unavailable on direct appeal and therefore lead to irreparable injury, the Jacksons have failed to show a probability of success on the merits. Indeed, for the Jacksons to succeed on a direct appeal they must initially surmount the hurdle of establishing that they have a right of action by distinguishing the Harper decision. As previously stated, there is little indication that Harper does not extend to the entire 1987 Act.

The Harper decision similarly precludes a showing that serious legal questions have been raised. Finally, we note Farm Credit's representations of millions of dollars in anticipated further losses should the stay not be lifted. Although this

would tend to tip the balance of hardships in Farm Credit's favor, we need not address it since the Jacksons have failed to show a probability of success on the merits.

III. Conclusion

The Jacksons' petition for writ of mandamus and request for a stay are denied.

THE MANDATE SHALL ISSUE AT ONCE.

would tend to tip the balance of hardships in Farm Credit's favor, we need not address it since the Jacksons have failed to show a probability of success on the merits.

III. Conclusion

The Jacksons' petition for writ of mandamus and request for a stay are denied.

THE MANDATE SHALL ISSUE AT ONCE.

APPENDIX C

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. CV-F-88-636-REC

DONALD L. JACKSON;
PATRICIA V.JACKSON,

Plaintiffs-Appellees,

v.

WESTERN FARM CREDIT BANK,
et al.,

Defendants-Appellants.

ORDER

On Appeal from the United States
District Court for the Eastern District

Filed January 26, 1990
Decided February 20, 1990

Before WRIGHT, HUG, LEAVY
Circuit Judges

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT

DONALD L. JACKSON; PATRICIA V.JACKSON,	)	No. 89-70453
Petitioners,	)	DC No. CF-F-88-636-REC
v.	)	
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,	)	
Respondent,	)	
WESTERN FARM CREDIT BANK, et al.,	)	
Real Party in Interest.	)	ORDER

Petition for Writ of Mandamus from the United States District Court for the Eastern District of California

Before: WRIGHT, HUG and LEAVY, Circuit Judges

Upon due consideration, the panel in the above-entitled case has voted unanimously to deny the petition for rehearing.

The petition for rehearing is DENIED.

APPENDIX D

United States Court of Appeals,
Ninth Circuit

DONALD L.JACKSON:
PATRICIA V. JACKSON,

Plaintiffs-Appellees,

v.

WESTERN FARM CREDIT
BANK, et al.,

Defendants-Appellants.

ORDER

Appeal from the United States District
Court for the Eastern District
Court of California

Decided January 16, 1990

Before TANG, HALL, O'SCANNLAIN
Circuit Judges

Robert E. Coyle,
District Judge, Presiding

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD L. JACKSON, et al.,	No. 89-16435
Plaintiffs-Appellants,	DC# CV-88-636-REC-F
vs.	
FARM CREDIT ADMINISTRATION, et al.,	Eastern California (Fresno)
Defendants-Appellees.	ORDER

Before: TANG, HALL & O'SCANNLAIN
Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. See Fed. R. Civ. P. 54(b); Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981).

Appellees' request for attorney fees is denied.

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APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
THE EASTERN DISTRICT OF CALIFORNIA

No. CV-F-88-636-REC

DONALD L. JACKSON;
PATRICIA V.JACKSON,

Plaintiffs,

v.

WESTERN FARM CREDIT BANK,
et al.,

Defendants.

ORDER

Argued and Submitted March 12, 1990
Decided March 14, 1990

Before Honorable Robert E. Coyle,
District Court Judgge for the
Eastern District of California

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DONALD L. JACKSON; PATRICIA V.JACKSON,	)	
Plaintiffs,	)	No. CF-F-88-636-REC
v.	)	
FARM CREDIT ADMINISTRATION, et al.,	)	
Defendants.	)	

On March 12, 1990 the court heard plaintiffs' Motion for Certification of Prior Court Order. Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies this motion for the reasons set forth herein.

By this motion, plaintiffs seek an order certifying the Order Dismissing First, Second, Third and Fourth Causes of Action of First Amended Complaint

filed on September 29, 1989 for immediate appeal pursuant to Rule 54(b), Federal Rules of Civil Procedure. It is in this order that the court relied upon Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), cert. denied, ____ U.S. ____, 107 L.Ed.2d 951 (1990) in dismissing these causes of action on the ground that there is no implied private right of action to enforce the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2001-2279aa-14 (the 1987 Act).

Defendants respond that they have no objection to the certification sought by plaintiffs as long as the court rules on Western Farm Credit Bank's Motion to Recover Damages Caused by Lis Pendens also set to be heard on March 12 because this motion also

arises out of the rulings with respect to the first four causes of action. However, as noted in the court's Order re Motion to Recover Damages Caused by Lis Pendens, the court cannot rule on the damages motion at this juncture.

Rule 54(b) provides in pertinent part:

> "When more than one claim for relief is presented in an action, ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties but only upon an express determination that there is no just reason for delay and upon an expres direction for entry of judgment."

Rule 54(b) applies only to adjudications that would be final under 28 U.S.C. § 1291 if they occurred in a simple single-claim, two-party case. Wright, Miller & Kane, 10 Federal Practice and Procedure § 2658.2 (1983).

Here, Farm Credit argues that the court's order dismissing the first four causes of action is not final unless and until there has been a ruling by the court on its' motion for damages. In so arguing, Farm Credit relies on Rule 65.1, Federal Rules of Civil Procedure. However, as held in the Order re Motion to Recover Damages Caused by Lis Pendens, the court does not agree that it can rule on this issue at this juncture.

The requisite degree of finality therefore existing, Morrison-Knudsen Co., Inc. v. Archer, 655 F.2d 962, 965 (9th Cir. 1981) explains:

> "Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants

for an early and separate judgment as to some claims or parties. The trial court should not direct entry of judgment under Rul3 54(b) unless it has made specific findings setting forth the reasons for its order. Those findings should include a determination whether, upon any review of the judgment entered under the rule, the appellate court will be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court. A similarity of legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to avoid a harsh and unjust result, documented by further and specific findings."

...

"In Curtiss-Wright, the Supreme Court noted in detail the factors underlying the district court's determination to enter separate judgment under Rule 54(b) in the case there under consideration. These are instructive:

> 'The District Court also provided a written statement of reasons supporting its decision to certify the judgment as final. It

> acknowledged that Rule 54(b) certification was not to be granted as a matter of course, ... because of the overload in appellate courts which would otherwise result from appeals of an interlocutory nature. The essential inquiry was stated to be 'whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants.' The District Court then went on to identify the relevant factors in the case before it. It found that certification would not result in unnecessary appellate review; that the claims finally adjudicated were separate, distinct, and independent of any of the other claims or counterclaims involved; that review of these adjudicated claims would not be mooted by any future developments in the case; and that the nature of the claims was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals."

These standards cannot be satisfied here. The pressing need for an early

and separate judgment as to the first four causes of action is supplied by the proposed sale of the property underlying this dispute: "As stated on many ocasions [sic], the JACKSONS have continuously sough [sic] to invoke their statutorily guaranteed right to repurchase their farm for it's fair market value. FARM CREDIT has continuously stated that it intends to sell the JACKSON farm to a third party, forever eliminating JACKSONS rights to reacquire their property." However, the court has expunged the lis pendens and the Ninth Circuit denied plaintiffs' request that it stay this order pending exhaustion of their appeals. If the underlying property has been sold, this pressing need no longer exists and, the court cannot grant this

motion under the standards set forth above. Moreover, because the lis pendens has been expunged, there is no legal way to prevent the sale of the property. Consequently, an early appeal will not necessarily protect plaintiffs' alleged rights to reacquire the property.

With respect to the concern about the similarity of the legal and factual issues, there is no question that this factor supports certification. Nonetheless, as a further and legitimate consideration, the court points out that the certification of this appeal could well be a complete waste of time to the detriment of defendants and the court. This is because the Ninth Circuit has indicated that it does not find plaintiffs' legal arguments valid.

In the Memorandum denying the Petition for Writ of Mandamus, the Ninth Circuit stated in pertinent part:

> "The district court dismissed the Jacksons' statutory claims in reliance on our recent opinion in Harper .... In Harper, we held that there was no implied private right of action under the 1987 Act ... Based on this ruling, the district court ordered the Jacksons' lis pendens on the property expunged."
>
> "The Jacksons do not contest Harper's validity, but rather contend it is distinguishable. Specifically, the Jacksons contend that Harper was limited to the debt restructuring provisionsof the 1987 Act and is therefore inapplicable to the rights of first refusal at issue here."
>
> "Contrary to the Jacksons' contentions, there is no explicit indication that our holding in Harper was not intended to apply to the 1987 Act in its entirety. Although only the debt restructuring provisions were at issue in Harper, we expressly framed the issue in terms of the entire statute ... Moreover, in joining other federal courts which have also rejected an implied

> right of action under the 1987 Act, we acknowledged and thereby implicitly rejected several contrary cases that recognized a right of action under the right of first refusal provisions of the Act ..."
>
> "Thus, the district court relied on recent and arguably controlling precedent in its decision to dismiss the Jacksons' statutory claims. We conclude, therefore, that the district court's order was not clearly erroneous as a matter of law."
>
> ...
>
> "... [T]he Jacksons have failed to show a probability of success on the merits. Indeed, for the Jacksons to succeed on a direct appeal they must initially surmount the hurdle of establishing that they have a right of action by distinguishing the Harper decision. As previously stated, there is little indication that Harper does not extend to entire 1987 Act."

While these statements are in no way binding on the Ninth Circuit on direct appeal, the court thinks they pretty much express what will be the outcome of the appeal.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Certification of Prior Court Order is denied.

Dated: March 14, 1990.

ROBERT E. COYLE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-5353.

Raymond P. Zajac and Helen Ann Zajac,
Appellants,
v.
Federal Land Bank of St. Paul,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

Submitted Dec. 12, 1988.
Decided Oct. 5, 1989.

Before HEANEY* and FAGG, Circuit Judges, and HANSON,** Senior District Judge.

HEANEY, Senior Circuit Judge.

* The HONORABLE GERALD W. HEANEY assumed senior status on December 31, 1988.

** The HONORABLE WILLIAM C. HANSON, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

Raymond and Helen Zajac, a North Dakota farm couple, appeal from a decision of the district court holding that the Agricultural Credit Act of 1987 (Act) does not provide the Zajacs with a private right of action to enjoin the Federal Land Bank of St. Paul (Bank) from foreclosing on the Zajacs' property until the Bank honors their request that an independent appraiser be appointed to appraise their property for purposes of restructuring their distressed loan with the Bank.

We hold that the Zajacs have a private right of action under the Act to require the appointment of an independent appraiser and remand to the district court for action consistent with this opinion.

BACKGROUND

In 1980, the Zajacs borrowed $250,000 from the Bank. By 1986, they were unable to continue making payments, and the Bank commenced foreclosure proceedings in state court. The Zajacs raised a number of defenses to the action. On December 14, 1987, the state court issued a decision in favor of the Bank.

The Bank delayed entry of its state court foreclosure judgment to afford the Zajacs an opportunity to restructure their loan under sections 102 and 106 of the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2202 and 2202a.

The Zajacs submitted an application for restructuring, which was considered but denied by the Bank on April 15, 1988, on the ground that the Bank would incur a greater loss under the Zajacs' restructuring proposal than would occur through a sale of the property at foreclosure. The Zajacs appealed that decision to the Bank's credit review committee. They asked the committee to appoint an independent appraiser pursuant to procedures required by the Act. The committee refused and, after a hearing, denied the Zajacs' application for restructuring. Judgment of foreclosure was entered by the state court on May 6, 1988.

The Zajacs appealed the judgment of foreclosure to the Minnesota Supreme Court and moved for a stay of judgment. The motion was denied, and the trial court was affirmed.

At that point, the Zajacs asked the United States District Court to enjoin the Bank from conducting a sheriff's sale on their land until it had complied with certain borrowers' rights provisions of the Act, including the provision mandating an independent appraisal.[1] The district court denied the Zajacs' motion after hearing. It held that there is no expressed or implied private right of action for failure to comply with the borrowers' rights provisions of the Act, that the Act did not require an independent appraisal of the Zajacs' land,[2] that the

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1 The Zajacs asserted in district court that they had been denied the right to an independent appraisal by the credit review committee, that Ken Bergh, CEO of the Bank, hated the Zajacs, that Bergh was on the credit review committee in violation of the Act, that if the committee would adopt the Zajacs' figures and methodology a different result could be reached on the analysis of cost of foreclosure as opposed to cost of restructuring, and that irreparable injury would result if the sheriff's sale was not enjoined. The only issue raised on appeal, however, is whether the trial court erred in holding that the Zajacs did not have a private cause of action to enforce their right to an independent appraisal prior to review by the credit review committee.

2 The lower court concluded from the statutory language that credit review committees have no legal obligation to appoint an independent appraiser in restructuring situations. The Zajacs argue that the lower court's interpretation is incorrect because it ignores the Agricultural Technical Corrections Act of 1988, which clearly states that borrowers have a right to an independent appraisal on review of a denial of restructuring. The Bank argues that the Technical Corrections Act should not apply retroactively in this case. We disagree with the Bank and hold that the district court erred. Section 1001 of the Technical Corrections Act provides that the amendments made by the Act "shall take effect as if enacted immediately after the enactment of the 1987 Act." Pub.L. No. 100-399, § 1001, 102 Stat. 989, 1008 (1988). Since the Agricultural Credit Act of 1987 became operative on January 6, 1988, the Technical Corrections Act became operative well before the Zajacs requested the independent appraisal in April of 1988. Moreover, there is no manifest injustice to the Bank from such retroactive application because the Bank presumably knew the state of the law in May of 1988 when it denied the Zajacs' request for an independent appraisal. Thus, the cases cited by the Bank in its brief are inapposite.

Bank's decision to deny restructuring was a commercial banking decision and that the relief requested would violate the Federal Anti-Injunction Act, 28 U.S.C. § 2283.

DISCUSSION

I. IS THE BORROWER'S PROCEDURAL RIGHT TO HAVE AN INDEPENDENT APPRAISER APPOINTED ENFORCEABLE IN FEDERAL COURTS?

The Agriculture Credit Act of 1987 does not provide an explicit private right of action to a borrower. Thus, the question is whether a borrower has an implied cause of action to enforce the independent appraisal procedures required by the Act.

The Act provides detailed procedures and formulae under which a borrower can seek to have a distressed loan restructured.[3] The bank is to restructure loans unless the cost of restructuring exceeds the cost of foreclosure.[4] Restructuring is defined as follows:

---

3 12 U.S.C. § 2202a(a)(3) provides as follows:

The term "distressed loan" means a loan that the borrower does not have the financial capacity to pay according to its terms and that exhibits one or more of the following characteristics:

(A) The borrower is demonstrating adverse financial and repayment trends.

(B) The loan is delinquent or past due under the terms of the loan contract.

(C) One or both of the factors listed in subparagraphs (A) and (B), together with inadequate collateralization, present a high probability of loss to the lender.

4 12 U.S.C. § 2202a(a)(2) and (e) provide as follows:

(a)(2) **Cost of foreclosure**

The term "cost of foreclosure" includes—

(A) the difference between the outstanding balance due on a loan made by aqualified lender and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(B) the estimated cost of maintaining a loan as a nonperforming asset;

(C) the estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as

> The terms "restructure" and "restructuring" include rescheduling, reamortization, renewal, deferral of principal or interest, monetary concessions, and the taking of any other action to modify the terms of, or forbear on, a loan in any way that will make it probable that the operations of the borrower will become financially viable.

12 U.S.C. § 2202a(a)(7). If the lender rejects the request for restructuring, further procedures can be instituted by the

---

> the result of the foreclosure, including attorneys' fees and court costs;
>
> (D) the estimated cost of changes in the value of collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclose or liquidate the loan and ending on the date of the disposition of the collateral; and
>
> (E) all other costs incurred as the result of the foreclosure or liquidation of a loan.
>
> * * *
>
> (e)(1) **Restructuring in general**
>
> If a qualified lender determines that the potential cost to such qualified lender of restructuring the loan in accordance with a proposed restructuring plan is less than or equal to the potential cost of foreclosure, the qualified lender shall restructure the loan in accordance with the plan.
>
> (2) **Computation of cost restructuring**
>
> In determining whether the potential cost to the qualified lender of restructuring a distressed loan is less than or equal to the potential cost of foreclosure, a qualified lender shall consider all relevant factors, including—
>
> (A) the present value of interest income and principal forgone by the lender in carrying out the restructuring plan;
>
> (B) reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the restructuring plan;
>
> (C) whether the borrower has presented a preliminary restructuring plan and cash-flow analysis taking into account income from all sources to be applied to the debt and all assets to be pledged, showing a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and
>
> (D) whether the borrower has furnished or is willing to furnish complete and current financial statements in a form acceptable to the institution.

borrower. The borrower can request a review of that decision. 12 U.S.C. § 2202(b)(1). As an aspect of that review, the Act grants a borrower the right to an independent appraisal. 12 U.S.C. § 2202(d).

In determining whether the Zajacs have an implied cause of action to assert a borrower's procedural right to an independent appraisal and other mandated procedures under the Act, the question of congressional intent is the ultimate issue and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 520, 98 L.Ed.2d 512 (1988). We hold, however, that the necessary intent is found in the language and structure of the 1987 Act, as well as its legislative history and general purpose.[5]

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5 Several courts have held that the 1987 Act creates an implied private right of action. *Griffin v. Federal Land Bank of Wichita*, 708 F. Supp. 313 (D.Kan.1989) (implicitly allowing a private right of action but finding no violation); *Leckband v. Naylor*, 715 F. Supp. 1451 (D.Minn.1988) (allowing a private right of action to enforce right of first refusal), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989); *Martinson v. Federal Land Bank of St. Paul*, No. A2-88-31 (D.N.D. Apr. 21, 1988) (same), *appeal dismissed*, No. 88-5202 (8th Cir. June 8, 1989); *In re Hilton Land & Cattle*, 101 B.R. 604 (D.Neb.1989) (allowing a private right of action in a bankruptcy action); *Meredith v. Federal Land Bank*, 690 F. Supp. 786 (E.D.Ark.1988) (implicitly allowing private right of action but dismissing for failure to state a claim). *See also Federal Land Bank of St. Louis v. McGinnis*, 711 F. Supp. 952, 958 (E.D.Ark.1989) (granting borrowers an affirmative defense on the basis that creditor failed to comply with the Act but denying relief because parties in question were not borrowers under the Act). *But see Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir.1989); *Wilson v. Federal Land Bank of Wichita*, No. 88-4058-R, 1989 WL 12731 (D.Kan. Jan. 30, 1989); *Neth v. Federal Land Bank of Jackson*, 717 F. Supp. 1478 (S.D.Ala.1988).

A. Language and Structure

The 1987 Act emphasizes that borrowers have the power to initiate certain procedures. Part C of the Act is entitled *"Rights of Borrowers; Loan Restructuring."* One of the procedures that borrowers can initiate is the right to an independent appraisal at the credit review committee stage of a restructuring proceeding. The pertinent part of the Act reads as follows:

> An appeal filed with a credit review committee under this section may include, as a part of the request for a review of the decision filed under subsection (b)(1) or (2) of this section, a request for an independent appraisal, by an accredited appraiser, of any interests in property securing the loan (other than the stock or participation certificates of the qualified lender held by the borrower).
>
> * * *
>
> Within 30 days after a request for an appraisal under paragraph (1), the credit review committee shall present the borrower with a list of three appraisers approved by the appropriate qualified lender from which the borrower shall select an appraiser to conduct the appraisal the cost of which shall be borne by the borrower and *shall consider the results of such appraisal in any final determination with respect to the loan.*
>
> * * *
>
> A copy of any appraisal made under this subsection shall be provided to the borrower.

12 U.S.C. § 2202(d)(1), (2) and (3) (emphasis added).

The language requiring the appointment of an independent appraiser upon request is mandatory rather than permissive. The System lender is directed to follow the statutory

procedure—the only discretion left to the lender and the credit review committee is to present the borrower with a list of three appraisers from which the borrower can select. Having done this, the committee is mandated to consider the results of the appraisal in any final determination with respect to the loan.

The language used by Congress with respect to the other borrowers' rights provisions is also mandatory in setting forth exceedingly detailed procedures that System lenders must follow. Thus, the Act provides, *inter alia:*

(a) That when it is determined that a loan made by a lender is distressed, the lender *shall* provide written notice to the borrower that the loan may be suitable for restructuring. 12 U.S.C. § 2201(b).

(b) That not later than 45 days before a lender begins foreclosure proceedings, the lender *shall* notify the borrower that the loan may be suitable for restructuring. 12 U.S.C. § 2202a(b)(2).

(c) That *no lender may* foreclose a distressed loan before the lender has completed consideration of the loan for restructuring. 12 U.S.C. § 2202a(b)(3).

(d) That the lender *shall* provide a reasonable opportunity for the borrower to meet personally with a representative of the lender. 12 U.S.C. § 2202a(c).

(e) That if the lender determines that the potential cost of restructuring a loan in accordance with a post-restructuring plan is less than or equal to the potential cost of foreclosing, the qualified lender *shall* restructure the loan in accordance with the plan. 12 U.S.C. § 2202a(e)(1).

The detail and precision by which Congress set forth borrowers' rights under this section are powerful indications that Congress intended to confer specific enforceable rights on borrowers. A private cause of action will be readily found "'where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff.'"

Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-72, 101 S. Ct. 1451, 1462, 67 L.Ed.2d 662 (1981), quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n. 13, 99 S. Ct. 1946, 1954 n. 13, 60 L.Ed.2d 560 (1979); *Miener v. State of Mo.*, 673 F.2d 969, 974 n. 4 (8th Cir.1982). The corollary of this is that if a System lender grants the specific rights mandated by the Act, there is no further purpose served by a judicial review of the lender's ultimate decision regarding foreclosure or restructuring. *Coutu*, 450 U.S. at 772, 101 S. Ct. at 1462.

The reasons why Congress found it necessary to adopt such detail and precision are set forth more fully in subsequent sections of this opinion. Suffice to say that earlier efforts of Congress to encourage restructuring of distressed loans had been ignored by many System lenders and Congress intended to remedy this situation.

B. The House Report

The House Report sets forth the twofold purpose of the Act. It stated:

> H.R. 3030 *will require* Farm Credit System lenders to restructure the loans of financially-stressed farmer-borrowers, in order to help keep farmers on the land and help turn around the condition of stressed System institutions.

H.R.Rep. No. 295(I), 100th Cong., 1st Sess. 52 (emphasis added), *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS 2723, 2723.

It went on to say:

> Much of the impetus for H.R. 3030 derives from the continuing depression in agriculture that began in the early 1980's but whose roots originate in the inflationary period in the late 1960's and 1970's.
>
> * * *

> H.R. 3030 * * * looks to the future—to an agricultural delivery system that not only will have dealt sensitively with today's financially-stressed farm borrowers but one that will be more competitive, more efficient and more responsive to economic realities.

Id. at 53-54, *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS at 2725.

The Report further states that the highlights of H.R. 3030 include:

> *Providing enhanced borrowers' rights and require restructuring rather than foreclosure of certain loans.*

Id. (emphasis added).

In discussing the testimony of the various witnesses to appear before the House committee, the Report states:

> Dozens of witnesses representing farmer and commodity groups testified before the Committee as to two basic weaknesses in the way many System institutions have dealt with its problems. First, System lenders have been exceedingly reluctant to restructure individual loans on a case-by-case basis; and, second, the tensions and pressures on both borrowers and lenders, brought on by financial distress, have caused collapse of the traditional sense of comity and good will between the System and its borrower/owners.

Id. at 62, *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS at 2733.

The Report went on to state:

> Complaints about the rights of System borrowers being abused at both the association and district levels have been like a constant drumbeat in the

> offices of some Members of Congress for several years. The package of borrower rights adopted in H.R. 3030 reflect a common sense approach which should have been standard operating procedures in a cooperative, borrower-owned lending system.

Id. at 64, *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS at 2735.

C. The Senate Report

In forwarding the Act to the floor of the Senate, the Senate Committee on Agriculture, Nutrition and Forestry stated that the Act called "for a major reorganization of the credit delivery mechanism for American agriculture" to assure economic security for the family farmer and rancher and stability of the Farm Credit System. S.Rep. 230, 100th Cong., 1st Sess., 21 (1987). One of the major elements of this reorganization was the mandated restructuring of distressed loans. This was necessary because System lenders were not restructuring when restructuring was cost-effective. The Act

> requires that System banks and associations receiving assistance must, in turn, assist troubled farmers and ranchers by restructuring their delinquent loans where that restructuring is less costly than foreclosure. Each Farm Credit System (FCS) District, that contains a System institution certified to receive assistance must establish a Special Asset Group to review each loan of a distressed farmer or rancher that is slated for foreclosure.
>
> These restructuring procedures were modeled after the St. Paul FCS District's restructuring program—farmers had their loans restructured when that was beneficial both to the System and the farmer. This program has helped thousands of needy farmers *and* has generated income for the

> System. Applying these procedures nationally will help alleviate a major drain on the System * * *.

Id. at 3. The Senate Report notes that the Senate bill granted farmer-borrowers specific rights to ensure an accurate determination of whether restructuring was cost-effective.

> Title IV provides farmer-borrowers with important rights—including the right to loan information (regarding differential interest rates, loan origination charges, changes in interest rates and loan options) and the right of first refusal to repurchase or lease land formerly owned by a borrower that has been foreclosed on by a System institution. Providing borrowers with advance and accurate loan information will allow them to make better informed financial decisions.
>
> Also, banks and associations *will be required* to use Credit Review Committees to review denials of new loans and restructuring of distressed loans. In order to both assist the institution, by creating earning assets, and to help the family farmer in all System institutions, the distressed loans of family farmers *must be restructured* under Title IV if the cost of restructuring is less than the cost of foreclosure.

Id. at 4-5 (emphasis added).

By granting farmer-borrowers certain specific rights, the Senate also intended to remedy many of the drastic consequences—including the tremendous number of foreclosures forcing farm families out of their homes—caused by the agricultural depression of the 1980's.

> The agricultural depression of the 1980's rivals that of the 1930's in terms of its impacts on farmers.
>
> * * *

> Farmers who either began operating in the 1970's or significantly expanded their operations in this period are most affected by the decline in land values because they have the greatest amount of debt. However, even farmers with no debt, who are close to retirement, have seen their net worth and hence their retirement savings stripped away by the collapse of farmland values.
>
> While debt has fallen significantly in the last three years the burden has not been uniformly reduced. Many of those reducing their debt holdings were able to do so because they had relatively low levels of debt relative to their income. Most disturbing to the Committee, the other major group causing the fall in debt has been those farmers forced off their farms as a result of their inability to meet their commitments to lenders. While roughly 40 percent of farmers have no debt some 10-12 percent of farmers holding 37 percent of the total debt are in extreme financial difficulty.

Id. at 14.

Senator Boren (D.-Okla.), the Senate manager of the bill, stated upon introduction of the bill to the Senate floor that:

> All institutions *must* restructure an eligible borrower's nonaccruing loan if: First, it is cheaper to restructure than to foreclose; second, the borrower is applying all income over and above necessary and reasonable living and operating expenses; third, if the borrower has the financial capacity and management skills to protect the collateral; fourth, if the borrower is capable of working out existing financial difficulties.
>
> * * *

> Borrowers who request an appeal to the credit review committee may also request that an independent appraisal of the collateral securing the loan be conducted. If an independent appraisal is requested, the *committee must consider the results of the independent appraisal when making its final determination on the loan.*

133 Cong.Rec. S16831 (1987) (emphasis added).

D. The Conference Report

The Conference Report reiterated the broad goal of the Act previously expressed in the House and Senate Reports. The 1987 Act was enacted, first and foremost, "to provide credit assistance to farmers." H.R.Conf.Rep., No. 490, 100th Cong., 1st Sess., 1. Chairman of the Conference Committee, Representative de la Garza, of Texas, in reading the Conference Report to the House, clearly expressed what the Conference Committee thought to be the driving force for enactment of the Act: "the terrible problem that our farmers and ranchers in rural America have experienced during the past several years." 133 Cong.Rec. H11869 (1987). He went on to say:

> Mr. Speaker, I hope that my colleagues will join with us to send the message at this point that we care, *that we would like for them to have another tool at their disposal,* which is credit of an acceptable nature so that they could continue providing us with the excellent food and fiber that they have done in the past.

Id. (emphasis added).

Senator McClure (R.-Idaho), upon the return of the Conference Report to the Senate and just before final passage of the Act, expressed the sentiment of Congress in terms that few could misunderstand:

> The most important part of this legislation ... is the restructuring of farm loans of financially stressed farmer-borrowers of the System. In order to keep these farmers on the land it is necessary for System banks and associations to change their attitude toward debt restructuring. In the past if a farmer was delinquent or late in payment, it was almost automatic that the bank or association began foreclosure or liquidation action. The banks and associations were not focused on helping the farmer through restructuring. With mounting losses, it became clear that doing business as usual would not suffice. A more lenient attitude was needed. Because this was not forthcoming from the System, Congress made restructuring an integral part of the financial assistance package. If System banks were to receive assistance from the Congress, they must restructure farmer loans where it is cheaper. *This legislation requires restructuring of farmer loans if it is the least cost alternative.*

133 Cong.Rec. S18458, S18469-70 (1987) (emphasis added).

In the light of the above, there certainly can be no quarrel that Congress viewed the Act as responsive to the needs of farmer-borrowers in ways that earlier Farm Credit Acts were not. Moreover, the Act clearly manifests Congress' intent to provide borrowers with the ability to enforce procedures granted to protect them from unjustified foreclosure. This can only be done by implying a private right of action for borrowers. *See, infra,* part G.

Implying a private right of action for borrowers to enforce carefully defined procedures mandated by the language of the Act is also consistent with a further goal of the 1987 Act to strengthen and stabilize the farm credit system. The Act requires lenders to make cost-effective decisions concerning the possibility of restructuring. *See Harper v. Federal Land Bank,* 878 F.2d at 1175 ("the 1987 Act is further reinforced by the

fact that a borrower's right to restructure a delinquent loan is limited to situations in which the cost of restructuring is less than or equal to the cost of foreclosure"). Granting borrowers a private right for injunctive relief requires lenders to weigh the costs of restructuring against the costs of foreclosure before resorting to the latter. Injunctive relief strengthens, rather than weakens, the Farm Credit System by requiring lenders to make a decision based on a thorough review of all factors and procedures deemed important by Congress.

E. Other Legislative History

When the bill reached the floor of the Senate after committee hearings, Senator Burdick (D-ND) offered an amendment on the Senate floor to expressly provide that *any person* would have a right to sue under the Act. His concern was that the House bill, which conferred an express cause of action only on borrowers, was too narrow, eliminating existing rights.[6] He stated:

> Currently, any person has the right to sue these two entities. However, the House provision arguably limits this right to borrowers of the System. This restricts rights of persons who are not yet borrowers, or who are farmer-borrowers, to sue.

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6 The House version of the 1987 Act included a provision that gave *borrowers* the right to sue any farm credit institution for violation "of any duty, standard, or limitation prescribed under the Act and owing to the borrower." H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. H7638, H7692 (Sept. 21, 1987).

Senator Burdick was obviously concerned that applicants for loans would be given rights but denied the right to enforce them under the House bill. He wanted to make sure that they, too, had the right to maintain an action to enforce the rights and procedures granted by the Act. His impression that, at the time, any person had the right to sue was not correct. This Circuit, for instance, held in *Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219, 223 (8th Cir.1988) and *Mendel v. Production Credit Ass'n of the Midlands*, 862 F.2d 180 (8th Cir.1988) that a borrower

> My amendment simply cleans up this problem and restores the rights to all persons, whether borrowers or not.

133 Cong.Rec.S. 16995 (December 7, 1987).

Senator Boren (D-Okla.), chairman of the Senate Subcommittee on Agricultural Credit and floor manager for the bill, responded as follows:

> I am told that the House has unduly restricted the right of the borrower to bring suit and that this is the proposal in the House bill. It would be my thought ... that we would oppose that House provision in the conference committee. That would have much the same effect as the adoption of the Burdick amendment would have without our attempting to write the actual language of the amendment here on the floor at this time.

Senator Richard Lugar, (R-Ind.), ranking minority member of the Senate Agriculture Committee, stated:

> I would confirm the understanding that the distinguished Senator from Oklahoma and I have with the distinguished author of this amendment.

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did not have the right to bring an action for damages under the 1985 Amendments to the 1971 Farm Credit Act.

Much of the misunderstanding over the question of whether borrowers had a private right of action at the time Congress enacted the present Act stems from an apparent confusion between common law actions under state law and statutory actions. *See, e.g.*, 133 Cong.Rec. H00000-30 (consideration of H.R. 3030 on the floor of the House of Representatives, statements of Representatives Watkins, Madigan and Glickman). At the time of enactment, some states permitted borrowers to use the Farm Credit Act of 1971 and its Amendments as a defense to foreclosure. *See, e.g., Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D.1987). *But see, e.g., Production Credit Ass'n v. Van Iperen*, 396 N.W.2d 35 (Minn.App.1986).

> We will in fact oppose the House amendment in conference. We understand the problem, and we would appreciate the Senator's not pursuing this amendment on this occasion with that assurance.

Id. On the basis of these assurances, Senator Burdick withdrew his amendment and the bill passed.[7]

The comments of Senator Boren and Senator Lugar are not, as described by the Bank and the Ninth Circuit in *Harper v. Federal Land Bank of Spokane,* 878 F.2d at 1176, isolated comments in the legislative record selected by plaintiffs to bolster their case. They were the comments by those in Congress responsible for managing the Act through the legislative process, making their statements more indicative of legislative intent than typical statements made during congressional proceedings. It thus seems patently clear that the Democratic and Republican managers of the bill on the Senate floor believed that accepting the House amendment would limit rather than expand the right to bring a private cause of action for the enforcement of the specific provisions of the Agricultural Credit Act.

F. Prior Case Law

The Bank argues that earlier Farm Credit System cases decided by this Court involving the question of implied right to private actions militate against giving such rights here. We do not agree. To the contrary, we believe that the past cases of this Circuit support the right to equitable relief. In *Allison v. Block,*

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7 Senators Burdick, Boren and Lugar, and the other congressmen who spoke, clearly intended that there be some form of judicial enforcement, at least the kind of judicial enforcement that is asked for in the instant case. On the other hand, there is not a single individual senator or congressman who stood up and said, "All right constituents, we are giving $4 billion to bail out the Farm Credit System. Along with this, we are going to give farmer-borrowers specific rights, but we do not intend to make such rights enforceable in court."

723 F.2d 631 (8th Cir.1983), we held that farmers were entitled to declaratory and injunctive relief against the Secretary of Agriculture and other officials enjoining them from foreclosing farm loans obtained from the Farmers Home Administration because the Secretary had failed to promulgate procedural and substantive regulations implementing legislation intended to defer farm loans in certain circumstances. The injunction prohibited the Secretary from foreclosing on farm loans until he had complied with the congressional Act.

In *Wilson, et al. v. Mason State Bank*, 738 F.2d 343 (8th Cir.1984), we held that the Wilsons could not maintain an action for *damages* against a private bank who had made a loan to the Wilsons under the Emergency Agricultural Adjustment Credit Act of 1978. Pub.L. No. 95-334, 92 Stat. 429-33 (appearing at 7 U.S.C. following section 1947) (1982). We distinguished *Allison v. Block, supra,* on the following grounds:

> *Allison* involved an action by a farmer against the Secretary of Agriculture to enforce the provisions of 7 U.S.C. § 1981a (1982). We found that in section 1981a, it was *Congress's intention to place an affirmative duty on the Secretary of Agriculture to establish procedures* to defer foreclosures on farm loans. We found that the purpose of the amendment was to benefit the farmers subject to foreclosure. We held that the Secretary's failure to establish such procedures was an abuse of discretion and granted the farmer injunctive relief. *Allison,* as such, *provides no support for the Wilsons' attempt to imply a private cause of action to recover money damages* for the Bank's alleged violations of regulations promulgated to protect FmHA.

Wilson, 738 F.2d at 345 (emphasis added).

In *State of Iowa, ex rel. Miller v. Block*, 771 F.2d 347 (1985) (Heaney, J., joined by Lay, C.J., with Fagg, J., dissenting), we again granted relief to individual farmers who sought to compel the Secretary of Agriculture to develop a program for the making of "disaster payments" to Iowa farmers who suffered disasters within the meaning of the Act. We noted that:

> It is not the business of this Court to order the Secretary to make payments under the SDPP to specific farmers. But when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress.

Id. at 352. We noted the importance of the "imperative language in the statute ('*shall*' make disaster payments)." *Id.* at 355.

In *Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219, 223 (8th Cir.1988), we held that the 1985 Amendments to the 1971 Farm Credit Act did not create an implied right of action *for damages*.

In *Mendel v. Production Credit Ass'n of the Midlands*, 862 F.2d 180 (8th Cir.1988), we followed *Redd* and held that neither the Farm Credit Act of 1971 nor the 1985 Amendments created by implication a private right of action *for damages*. We specifically left open the question of whether farmer-borrowers might have a private right of action to enforce the provisions of the 1985 Amendments.

There are significant differences between the 1985 Amendments and the 1987 Act. The 1985 Amendments did not have a section entitled "Borrowers' Rights." Title III of the 1985

Amendments was entitled: "TITLE III—PROTECTION FOR FARMERS AND OTHER FARM CREDIT SYSTEM BORROWERS; DISCLOSURE AND ACCESS TO INFORMATION." The 1985 Amendments simply required that System lenders shall (1) provide to their borrowers meaningful and timely disclosure of interest rate information,[8] (2) develop a policy of forebearance,[9] (3) provide borrowers copies of loan

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8 SEC. 4.13. DISCLOSURE.—(a) In accordance with regulations of the Farm Credit Administration, System institutions shall provide to their borrowers, for all loans that are not subject to the Truth in Lending Act (15 U.S.C. § 1601 et seq.), meaningful and timely disclosure of the following:

(1) the current rate of interest on the loan;

(2) in the case of an adjustable or variable rate loan, the amount and frequency by which the interest rate can be increased during the term of the loan or, if there are no such limitations, a statement to that effect, and the factors (including, but not limited to, the cost of funds, operating expenses, and provision for loan losses) that will be taken into account by the lending institution in determining adjustments to the interest rate;

(3) the effect, as shown by a representative example or examples, of the required purchase of stock or participation certificates in the institution on the effective rate of interest; and

(4) any change in the interest rate applicable to the borrower's loan.

9 SEC. 4.13. DISCLOSURE.—(b) In accordance with regulations of the Farm Credit Administration System institutions shall develop a policy governing forbearance. Each System institution shall provide borrowers with a copy of the institution's policy regarding forbearance at such time or times as the Farm Credit Administration shall prescribe in such regulations.

documents,[10] (4) establish credit review committees,[11] and provide a loan review mechanism.[12]

By 1987, Congress had determined that it simply could not rely on the Farm Credit System to initiate and operate a program and to promulgate regulations to implement that program

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10 SEC. 4.13A. ACCESS TO DOCUMENTS AND INFORMATION.—In accordance with regulations of the Farm Credit Administration, System institutions shall provide their borrowers, at the time of execution of loans, copies of all documents signed by the borrower and at any time thereafter, on a borrower's request, copies of all documents signed or delivered by the borrower and at any time, on request, a copy of the institution's articles of incorporation or charter and bylaws.

11 SEC. 4.14. RECONSIDERATION OF ACTION ON LOAN APPLICATION.—The Board of directors of each Farm Credit System institution shall establish one or more credit review committee(s), which shall include farmer board representation. Any loan applicant who has received written notice, under section 4.13, of a decision to deny or reduce the loan applied for, if the applicant so requests in writing within thirty days after receiving such notice, may obtain a review of such decision in person before the credit review committee. When a loan applicant requests review of an adverse credit decision, a majority of persons serving on such reviews committee must be persons who were not involved in making the adverse decision. Promptly after any such review, the applicant shall be notified in writing of the credit review committee's decision and the reasons therefor.

12 SEC. 307. Each local lending institution of the Farm Credit System established under the Farm Credit Act of 1971 (12 U.S.C. § 2001 et seq.) shall—

(1) review each loan that has been placed in non-accrual status by such institution to determine whether such loan may be restructured based on changes in the circumstances of such institution as the result of this Act and the amendments made by this Act; and

(2) notify in writing the borrower of each such loan of the provisions of this section.

which would give meaningful relief to distressed farmer-borrowers.[13]

G. Alternate Remedies

The Bank argues that Congress has armed the farm credit system with a variety of administrative remedies to assure compliance with the borrowers' rights provisions of the Agricultural Credit Act of 1987 and that by entrusting the Farm Credit Administration (FCA) in the first instance with enforcement of the Act, Congress provided a mechanism that fosters consistency in interpretation and application and minimizes the potential expense and delay of numerous private court challenges to the conduct of institutions within the System. The plain fact, however, is that the FCA is in no position to effectively enforce the borrowers' rights provisions of the 1987 Act. The farm borrowers have no way to invoke the remedial powers of the FCA. There is no procedure for filing charges or complaints. As the Supreme Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979),

> [Congress] has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those

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13 Representative Jones of Tennessee, in bringing H.R. 3030 from committee to the floor of the House, stated:

> In summary I want to let the system and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the system and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to ensure that full advantage is taken of the provisions of the new law.

133 Cong.Rec. H11869, H11873 (December 18, 1987).

> persons the ability to activate and participate in the administrative process contemplated by the statute.

There is no such assurance here.

Moreover, this record does not support the view that the FCA has either the ability or willingness to enforce the borrowers' rights provisions. The FCA has viewed its primary responsibility as one of examining the institutions in the System for financial condition, quality of management, soundness and compliance with laws and regulations. The fact is that during 1987 the FCA took only 24 enforcement actions, none of which sought compliance with the borrowers' rights provisions of the 1987 Act.

Finally, even if the FCA with its limited resources wanted to enforce the borrowers' rights provisions of the Act, its authority to issue temporary cease and desist orders is unavailable because such orders can only be issued if the lender's violation

> is likely to cause insolvency or substantial dissipation of assets or earnings of the institution or otherwise seriously prejudice the interests of the investors in Farm Credit System obligations or shareholders in the institution.

12 U.S.C. § 2262(a). Similarly, its authority to suspend or remove officers extends only to those situations involving substantial financial loss, impairment of shareholder interests or personal dishonesty. 12 U.S.C. § 2264(a).

In sum, borrowers are unable to enforce their rights through administrative avenues. *But see Harper v. Federal Land Bank*, 878 F.2d at 1176-77.

abuses of state court foreclosure proceedings.[14] Congress, therefore, enacted the Act to preclude the institution or continuation of a state court foreclosure proceeding until the lender considers restructuring. By temporarily stopping the continuation of a foreclosure proceeding, the Act encompasses the use of injunctions by a federal court to prevent state court foreclosure proceedings in violation of the Act.

The Act, together with its legislative history, establish congressional authorization so that the 1987 Act falls squarely within the "expressly authorized" exception to the Anti-Injunction Act. Thus, the Anti-Injunction Act does not bar injunctive relief in this instance.

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14 In the instant case, the Bank used state court foreclosure proceedings once the Zajacs could not meet their financial obligations. By enacting the 1987 Act, Congress attempted to require System lenders to evaluate the economics of restructuring before resorting to the drastic remedy of foreclosure. When introducing one of the Senate bills, Senator Pryor explained:

> The Farm Credit System was established to ensure the existence of a viable source of credit on reasonable terms for farmers at times when the market will not provide such credit. The Farm Credit System's historical mission has been to strengthen participation in agriculture, by broadening the availability of credit to borrowers ... Unfortunately, during the crises of the past few years the managers of the Farm Crdit System seem to have forgotten whom their cooperative was established to serve. In many parts of the country the Farm Credit System looked to foreclosure as a first resort rather than a last resort.... The bill that we introduce today is aimed at reestablishing Farm Credit System policies that will help farmers in need of help and at preserving local control of the Farm Credit System.

S. 1156, 100th Cong., 1st Sess., 133 Cong.Rec. 6102-03 (May 6, 1987). Senator Melcher, upon introduction of the second Senate bill, stated:

> Before this crisis becomes a disaster, Mr. President we must do something to lift this crushing burden from the back of rural America. We must get system interest rates down and stop the wholesale foreclosure and forced liquidations of family farms and ranches.

S. 1665, 100th Cong., 1st Sess., 133 Cong.Rec. 11725 (August 7, 1987).

CONCLUSION

We thus conclude that farm borrowers have a private right of action to enforce the borrowers' rights provisions of the Act, one of which requires that, on review, an independent appraiser be named on the request of the farmer-borrower.[15] We go no further than that in this case.[16] We do not suggest that, if the

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15 In *Harper*, the Ninth Circuit in applying *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975), apparently concluded the 1987 Act was not enacted for the "especial" benefit of farmer-borrowers. *Harper v. Federal Land Bank of Spokane*, 878 F.2d at 1174-75. We disagree. There can be no doubt that farmer-borrowers are a protected class under the Act because its language and structure established broad rights for borrowers and mandatory duties for lenders. A private cause of action will be readily found "where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-72, 101 S. Ct. 1451, 1462, 67 L.Ed.2d 662 (1981), *quoting Cannon v. University of Chicago*, 441 U.S. 677, 690 n. 13, 99 S. Ct. 1946, 1954 n. 13, 60 L.Ed.2d 560 (1979); *Miener v. State of Mo.*, 673 F.2d 969, 974 n. 4 (8th Cir.1982).

Certainly, Congress drafted the 1987 Act with an "unmistakable focus on the benefitted class," farmer-borrowers. *Cannon*, 441 U.S. at 691, 99 S. Ct. at 1955; *Hofbauer v. Northwestern Nat. Bank of Rochester*, 700 F.2d 1197, 1200 (8th Cir.1983). This is not a case where the provisions in question were primarily concerned with lenders rather than borrowers. *Hofbauer*, 700 F.2d at 691. There is no better evidence of this "unmistakable focus" than the fact that the 1987 Act permits only borrowers to initiate the procedures enacted within the "borrowers rights" provisions of the Act. Moreover, to conclude otherwise ignores the fact that the Federal Credit System was created specifically to provide capital for farmers.

16 Such a rule will not result in costly litigation for System lenders. Enforceable rights of borrowers are limited, requiring only specific injunctive relief. There will be the need for only limited discovery and pleadings. Moreover, we have not held that damages are available. Ultimately, if the System lenders follow the narrowly prescribed rules set forth in the Act, this Court will not permit an action to proceed into the merits of the System lender's decision to foreclose rather than restructure.

borrowers' rights provisions are followed and the credit review committee still decides to deny the request to restructure, we will review the reasonableness of that decision. We have no intention of interjecting ourselves into credit decisions of a System lender if the lender complies with the statutorily mandated procedures. Our view is that Congress enacted the Act in the belief that System lenders would act wisely if they complied with such procedures. With respect to the procedure at issue here, Congress wanted to ensure that there was an independent appraisal in the record so that the farmer-borrower could effectively argue his case before the credit review committee and that the committee would base its decision on all relevant information. We believe that it would be inappropriate for us to refuse to enforce this specific procedure.

As a final argument, the Bank asserts that its failure to grant the Zajacs' request for an independent appraisal is plainly harmless under the circumstances of this case. The Bank's assertion may well be true, but its request fails to recognize the limited scope of the rights granted to borrowers by Congress and, thereby, the limited scope of the remedies available to federal courts pursuant to the Act. By asking to evaluate the harmlessness of the Bank's decision, the Bank asks this Court to evaluate whether the credit review committee's decision to foreclose is reasonable in light of an independent appraisal prepared by the Zajacs. This sort of question—whether a credit review committee's decision is reasonable—is a type of judicial inquiry clearly not authorized by the Act or desired by Congress. This Court can enforce only those specific procedures granted to protect borrowers. We therefore remand this matter to the district court with directions to enjoin the Bank from foreclosing on the property in question until such time as the

Bank complies with the mandated procedures found in the borrowers' rights provisions of the Act.

FAGG, Circuit Judge, dissenting.

For the reasons stated by the Ninth Circuit in *Harper v. Federal Land Bank of Spokane,* 878 F.2d 1172 (9th Cir.1989), I do not believe farm borrowers have an implied cause of action to enforce the borrowers' rights provisions of the Agricultural Credit Act of 1987. Thus, I would affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 88-4033, 88-4120.

MYRON S. HARPER and JANE HARPER,
Plaintiffs-Appellees,
v.
FEDERAL LAND BANK OF SPOKANE,
a corporation, *et al.*,
Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted May 4, 1989.
Decided June 27, 1989.

Before TANG, SKOPIL and KOZINSKI,
Circuit Judges

Owen M. Panner, Chief Judge, Presiding

Richard A. Edwards, James N. Westwood, Miller, Nash, Wiener, Nash, Wiener, Hager & Carlsen, Portland, Or., John D. Albert, Churchill, Leonard, Brown & Donaldson, Salem, Or., for defendants-appellants.

James T. Massey, Farmers' Legal Action Group, Inc., Sisters, Or., Michael J. Martinis, Webb and Martinis, Salem, Or., for plaintiffs-appellees.

Jocelyn F. Olson, Asst. Atty. Gen., State of Minn., St. Paul, Minn., for amici curiae.

Richard W. Brunette, Jr., Marsha D. Galinsky, Sheppard, Mullin, Richter & Hampton of Los Angeles, Cal., for amicus curiae Western Farm Credit Bank.

OPINION

SKOPIL, Circuit Judge:

The primary issue on appeal is whether there is an implied private right of action to enforce the Agricultural Credit Act of 1987 ("1987 Act"), 12 U.S.C. §§ 2001-2279aa-14. The district court held that the 1987 Act creates such an action and found that the Federal Land Bank ("FLB") and Willamette Production Credit Association ("WPCA") violated the statute. *Harper v. Federal Land Bank of Spokane*, 692 F. Supp. 1244, 1252-53 (D.Or.1988). We hold there is no implied private right of action for the 1987 Act. We reverse.

FACTS AND PRIOR PROCEEDINGS

Myron and Jane Harper ("the Harpers") own and operate a farm in Oregon encumbered by mortgages held by FLB and WPCA. The Harpers began having difficulty with loan repayments in the early 1980's. In May 1984 WPCA rejected the Harpers' loan renewal request and filed a foreclosure action against them five months later in state court. In February 1985 the Harpers filed a complaint against numerous institutions and officers of the Farm Credit System seeking, *inter alia*, an order enjoining WPCA's state foreclosure proceeding. The district court denied the Harpers' motion for an injunction and dismissed the action. *Harper v. Farm Credit Admin.*, 628 F. Supp. 1030, 1033-34 (D.Or.1985).

After several continuances of the state court's foreclosure trial, the Harpers entered into a settlement agreement to restructure the WPCA debt. Instead of performing the settlement, however, the Harpers filed a Chapter 11 bankruptcy petition on May 30, 1986. In July 1986 WPCA obtained relief from the automatic stay, and the state foreclosure action was reinstated.

In September 1986 FLB obtained relief from the automatic stay and filed a foreclosure complaint against the Harpers in January 1987. In June 1987 the Harpers asked FLB about

possible forbearance on their FLB loans. FLB supplied them an application form and requested financial information but received neither an application for forbearance nor financial data from the Harpers until April 21, 1988.

On September 3, 1987 the state court entered a default judgment of foreclosure in favor of FLB. On October 9, 1987 WPCA secured a judgment of foreclosure by stipulation. FLB scheduled a sheriff's sale for November 17, 1987. On November 13, 1987 the Harpers filed a Chapter 12 bankruptcy petition, thereby staying the sheriff's sale. In February 1988, on the Harpers' motion, the bankruptcy court dismissed the petition. The sheriff's sale was held in March 1988.

The Harpers thereafter moved to set aside the judgments. The state court found that the judgments were authorized by the Harpers' prior attorney, denied the Harpers' motion to set aside the judgments, and ruled that the order confirming the sale could be entered.

The Harpers then filed this action in federal district court seeking an injunction barring continuation of the state court process. The district court granted a preliminary injunction and enjoined FLB and WPCA (together "the Lenders") from transferring the property pending resolution of the Harpers' claims. After a court trial the district court held that the Lenders violated the 1987 Act. *Harper,* 692 F. Supp. at 1253. The court concluded that the Lenders had a duty under federal law to "weigh the costs of foreclosure against the costs of restructuring prior to proceeding with the sheriff's sale." *Id.* The Lenders were enjoined from evicting the Harpers from their property. *Id.* The district court also issued an order directing the parties to apply to state court for an order rescinding the sheriff's sale.

On appeal, the Lenders contend the 1987 Act does not provide an implied private right of action. Alternatively, they argue (1) they have not violated the 1987 Act; (2) the actions taken by the district court were prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283 (1982); (3) the district court did not have the authority to command the parties to

stipulate in state court to an order rescinding a completed sheriff's foreclosure sale or to restrain the purchasers from taking possession of the property; and (4) the district court's findings as to WPCA are clearly erroneous. We decide only that there exists no private right of action and therefore we do not reach the alternative arguments.

DISCUSSION

I.

In *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975), the Supreme Court set forth four factors to determine whether Congress intended to imply a private cause of action in a federal statute.

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted--that is, does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S. Ct. at 2088 (internal quotations and citations omitted) (emphasis in original). Subsequent to *Cort*, the Court has indicated that the second and third factors are determinative of whether a court should imply a private right of action from a statutory scheme. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 105 S. Ct. 3085, 3091-92, 87 L.Ed.2d 96 (1985); *see also In re Washington Public Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1354 (9th Cir.1987) (en banc) ("a failure to satisfy these two factors is determinative").

Moreover, it is now clear that the focal point of our inquiry is the second factor--the intent of Congress. *See Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 516, 98 L.Ed.2d 512 (1988) (unless congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, a private remedy simply does not exist). Nevertheless, we look to all four factors "[a]s guides to discerning that intent." *Id.*

1. Especial Benefit of Plaintiffs

The district court concluded that the Harpers satisfied the first factor as "one of the class for whose especial benefit the statute was enacted" because Title I of the 1987 Act, entitled "Assistance to Farm Credit System Borrowers," established broad rights for borrowers and mandatory duties for lenders. *Harper*, 692 F. Supp. at 1247. We agree that one of the purposes of the 1987 Act was to provide borrowers with certain limited rights, including the right to restructure distressed loans and the right of first refusal by the previous owner when the lenders elect to sell acquired property. We look at the overall purpose of the 1987 Act, however, and conclude that the major impetus for the legislation was the financial crisis of the Farm Credit System. "[The bill] is necessary to reassure both American farmers and our financial markets that the Farm Credit System will remain a viable entity next year and into the 21st century." 133 Cong.Rec.S. 16831 (Dec. 1, 1987) (remarks of Sen. Leahy). "[The bill] has two major objectives: First, provide meaningful assistance to the system; and second, minimize to the greatest extent possible exposure to the Federal budget." 133 Cong.Rec.S. 16833 (Dec. 1, 1987) (remarks of Sen. Boren).

Our conclusion that the financial crisis of the Farm Credit System was the primary purpose of the 1987 Act is further reinforced by the fact that a borrower's right to restructure a delinquent loan is limited to situations in which the cost of restructuring is less than or equal to the cost of foreclosure. 12 U.S.C. § 2202a(e)(1). In other words, restructuring is not

always available to borrowers but is limited to situations involving no additional expense to the system.

2. Legislative Intent

The district court concluded that the legislative history supports an implied right of action, even though Congress considered enacting an express private right of action and later deleted that section. *Harper*, 692 F. Supp. at 1247-49. The court reasoned that the express provision was eliminated because some members of Congress "were under the misperception that the farmers already had the right to sue." *Id.* at 1248. Senators Pryor, Cochran, Fowler, and Sanford, for example, sought to include an express private right of action "to affirm that borrowers have a right to sue." S. 1156, 100th Cong. 1st Sess. 133 Cong.Rec. 6105 & 6107 (May 6, 1987). One version of the Senate bill included an express private right of action. S. 1665, 100th Cong., 1st Sess., 133 Cong.Rec. 11750 (August 7, 1987).

A proposed House bill also contained an express private right of action. Representative Watkins said he believed that "the right to sue is implied within the bill itself" but an express provision was necessary "to make sure that there is no question that the borrower has that right." H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. 7638, 7692 (September 21, 1987). In response to a question whether farmers currently had the right to sue, Representative Watkins responded that in some states they did, and Representative De La Garza said "I think basically they have that right now." *Id.* at 7693.

Prior to a conference committee on the bills, Senator Burdick questioned whether the House bill's inclusion of a private right of action "actually restricts the right to sue." S. 1665, 100th Cong. 1st Sess., 133 Cong.Rec. 16993, 16995 (December 2, 1987). Senator Boren responded with a plan to "oppose that House provision in the conference committee." *Id.* The Senate opposed the House provision and it was deleted from the final 1987 Act. H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. 11820 (December 18, 1987).

The district court concluded from that legislative history that "[b]oth the House and Senate intended that the borrower have the right to bring a private action in federal court to enforce the Act." *Harper,* 692 F. Supp. at 1248, citing *Cannon v. University of Chicago,* 441 U.S. 677, 711, 99 S. Ct. 1946, 1965, 60 L.Ed.2d 560 (1979) ("the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was.") (internal quotations omitted). It is abundantly clear, however, that there existed no implied private right of action under the various predecessor statutes or regulations in force prior to the 1987 Act. *See, e.g., Bowling v. Block,* 785 F.2d 556, 557 (6th Cir.) (Farm Credit Act of 1971), *cert. denied,* 479 U.S. 829, 107 S. Ct. 112, 93 L.Ed.2d 60 (1986); *Smith v. Russellville Prod. Credit Ass'n,* 777 F.2d 1544, 1548 (11th Cir.1985) (Farm Credit Act of 1971 and regulations); *Redd v. Federal Land Bank of St. Louis,* 661 F. Supp. 861, 864 (E.D.Mo.1987) (1985 amendments), *aff'd,* 851 F.2d 219, 223 (8th Cir.1988); *Mendel v. Production Credit Ass'n,* 656 F. Supp. 1212, 1216 (D.S.D.1987) (1985 amendments), *aff'd,* 862 F.2d 180, 182 (8th Cir.1988). *But cf. Federal Land Bank of St. Paul v. Overboe,* 404 N.W.2d 445, 449 (N.D.1987) (allowing use of 1985 amendments as an affirmative defense in state foreclosure action).

"The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection,* 474 U.S. 494, 501, 106 S. Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). Here, an express private right of action was proposed in both houses of Congress but deleted in the final conference version. "'Because the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.'" *Department of Health and Welfare v. Block,* 784 F.2d 895, 901 (9th Cir.1986) (quoting *Demby v. Schweiker,* 671 F.2d 507, 510 (D.C.Cir.1981)). We conclude that the district court gave inappropriate weight to remarks made by members of Congress.

See Regan v. Wald, 468 U.S. 222, 237, 104 S. Ct. 3026, 3035, 82 L.Ed.2d 171 (1984). "To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Id.*

Even if the congressional statements are ambiguous on the creation of a private right of action, our review of the administrative remedies provided by the 1987 Act convinces us that Congress intended administrative review to be the exclusive remedy. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15, 101 S. Ct. 2615, 2623-24, 69 L.Ed.2d 435 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."); *see also Karahalios v. National Fed'n of Fed. Employees*, Local 1263, --- U.S. ----, 109 S. Ct. 1282, 1287, 103 L.Ed.2d 539 (1989) (administrative remedies provided by statute shows clear congressional intent not to provide a private cause of action).

Here the administrative scheme provides for "Credit Review Committees" which must include farmer-director representatives. 12 U.S.C. § 2202(a). The applicant/borrower is entitled to prompt written notice of any action taken with respect to the denial or reduction of a loan or the denial of loan restructuring. 12 U.S.C. § 2201(a). If a loan application or loan restructuring proposal is denied, the applicant/borrower is entitled to learn the reason for the denial and to receive notice of the applicant's/borrower's right to seek review of the adverse decision. 12 U.S.C. § 2201(b). The applicant/borrower has the right to seek review of the adverse decision and to bring counsel or other representation to seek a reversal of the denial. 12 U.S.C. §§ 2202(b) & (c). In addition, 12 U.S.C. § 2261-2274 grants extensive enforcement powers to the Farm Credit Administration ("FCA"). The FCA has the power to issue cease and desist orders against any institutions or persons who violate

the statute or applicable regulations, as well as the power to suspend or remove Farm Credit System officers and directors. 12 U.S.C. §§ 2266(b), 2264. The FCA is further empowered to assess civil and criminal sanctions to enforce these provisions. 12 U.S.C. §§ 2268(a), 2269.

The Harpers nevertheless contend that the remedies available are not comprehensive enough to preclude an implied private cause of action under the 1987 Act. First, they claim there is no procedure for filing charges or for compelling FCA to commence an investigation. Second, they argue that FCA's enforcement apparatus is inadequate to enforce the borrower's rights. Third, they assert that FCA's authority to issue temporary cease and desist orders is limited to violations likely to cause insolvency and that FCA's issuance of permanent cease and desist orders is extremely time consuming. Finally, they argue there is no provision in the statute guaranteeing any remedy for the individual borrower; thus borrowers will be without a remedy for lender violations.

We do not dispute that an implied private right of action would enhance the administrative remedies provided under the 1987 Act. We have previously rejected, however, enhancement as a factor in the analysis of implied remedies. *Le Vick v. Skaggs Companies, Inc.,* 701 F.2d 777, 778-79 (9th Cir.1983). Moreover, the argument that a private right of action must be implied or else borrowers will be without a remedy overlooks the apparent right in some states of a borrower to allege the failure to afford restructuring rights as an affirmative defense to foreclosure. *See Federal Land Bank of St. Paul v. Bosch,* 432 N.W.2d 855, 858-59 (N.D.1988) (allowing use of 1986 regulations as an affirmative defense in state foreclosure action); *Overboe,* 404 N.W.2d at 449 (allowing use of 1985 Act as an affirmative defense in state foreclosure action). *But see Federal Land Bank of St. Louis v. Hopmann,* 658 F. Supp. 92, 94 (E.D.Ark.1987) (rejecting defense).

3. Consistency with Legislative Purpose

The district court concluded that a private right of action strengthens the Farm Credit System because it forces lenders to make cost effective decisions concerning the possibility of restructuring loans. *Harper,* 692 F. Supp. at 1249. While we do not disagree with that conclusion, we do conclude that the primary purpose of the 1987 Act was to restore financial integrity to the Farm Credit System. Allowing a private right of action undermines that objective by involving the Farm Credit System in costly litigation. Although the statute provides borrowers with limited rights, the major purpose of the 1987 Act was to provide financial stability to the Farm Credit System at a minimum cost to taxpayers. 133 Cong.Rec.S. 16833 (Dec. 1, 1987) (remarks of Sen. Boren).

4. Cause of Action Relegated to State Law

The district court concluded that the rights created under the 1987 Act were exclusively federal because Congress's goal of keeping farmers on their land is not a traditional state concern. *Harper,* 692 F. Supp. at 1249. The district court, however, addressed only sections 2202a(c) and (d) regarding loan restructuring and ignored section 2202a(b)(3) which prohibits lenders from continuing foreclosure proceedings. We have held that the latter is traditionally controlled by state law. *See Rank v. Nimmo,* 677 F.2d 692, 697 (9th Cir.) (no private right of action under the Veterans Administration Home Loan Guarantee Program to set aside a foreclosure since mortgage foreclosures are traditionally a matter of state law), *cert. denied,* 459 U.S. 907, 103 S. Ct. 210, 74 L.Ed.2d 168 (1982).

5. Summary

We conclude that none of the four *Cort* factors supports an implied private cause of action under the 1987 Act. Because Congress provided administrative remedies to borrowers and we find the legislative history to be ambiguous, "we are compelled to conclude that Congress provided precisely the

remedies it considered appropriate." *Middlesex,* 453 U.S. at 15, 101 S. Ct. at 2623. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club,* 451 U.S. 287, 297, 101 S. Ct. 1775, 1781, 68 L.Ed.2d 101 (1981). Thus we join the several other courts which have also rejected an implied right of action under the 1987 Act. *See, e.g., Wilson v. Federal Land Bank of Wichita,* No. 88-4058-R (D.Kan. Jan. 30, 1989) (1989 WL 12731); *Neth v. Federal Land Bank of Jackson,* 717 F. Supp. 1478 (S.D.Ala. 1988); *Zajac v. Federal Land Bank of St. Paul,* No. 88-A3-88-115 (D.N.D. July 19, 1988) 1988 WL 166 118, *appeal pending,* No. 88-5353 (8th Cir.). *But see Griffin v. Federal Land Bank of Wichita,* 708 F. Supp. 313 (D.Kan.1989) (allowing a private right of action but finding no violation); *Leckband v. Naylor,* 715 F. Supp. 1451 (D.Minn. May 17, 1988) (allowing a private right of action to enforce right of first refusal), appeal pending, No. 88-5301 (8th Cir.); *Martinson v. Federal Land Bank of St. Paul,* No. A2-88-31 (D.N.D. Apr. 21, 1988) (same), *appeal pending,* No. 88-5202 (8th Cir.).

II.

The district court sua sponte declared that the Harpers also presented a 42 U.S.C. § 1983 claim. *Harper,* 692 F. Supp. at 1251-52. We agree that an independent section 1983 inquiry is required because "there could well be federal rights enforceable under section 1983 which are not enforceable by means of a private right of action under the statute creating them." *Boatowners and Tenants Ass'n, Inc. v. Port of Seattle,* 716 F.2d 669, 674 (9th Cir.1983). We conclude, however, that section 1983 does not provide a cause of action to remedy the violations alleged by the Harpers. Courts have refused to apply section 1983 to plaintiffs alleging violations of the Farm Credit Act of 1971 and the 1985 amendments. *See Schroder v. Volcker,* 646 F. Supp. 132, 135 (D.Colo.1986) (plaintiff did not allege that defendants were state actors or that state foreclosure laws permitted sale of plaintiffs' property without notice and opportunity to contest the sale; therefore "plaintiffs have failed

to allege that the defendants acted under color of state law"), *aff'd*, 864 F.2d 97, 98-99 (10th Cir.1988); *Brekke v. Volcker*, 652 F. Supp. 651, 654-55 (D.Mont.1987) (same). Furthermore, the fact that a state permits the use of foreclosure procedures and subsequent sheriff sales as the execution of a judgment is not sufficient to constitute state action. *Earnest v. Lowentritt*, 690 F.2d 1198, 1202 (5th Cir.1982); *see also Roudybush v. Zabel*, 813 F.2d 173, 177 (8th Cir.1987) ("State policy is not implicated when an injured party claims that a private party has violated a constitutional post-judgment procedural statute in the course of depriving the injured party of property."); *Kolb v. Naylor*, 658 F. Supp. 520, 524 (N.D.Iowa 1987) ("use of state law to foreclose is not sufficient to allege a claim under section 1983"). Thus we hold that the Harpers have not alleged and may not maintain a section 1983 action.

REVERSED.

APPENDIX H

ROBERT B. WILSON
& ASSOCIATES
Independent Real
Estate Appraisers
2908 North Wishon Ave.
Fresno, California 93704
Phone (209) 227-0797

August 18, 1989

Cowin & Hrdlicka
2150 Tulare St., 2nd Floor
Fresno, CA 93721

Attention: William L. Cowin

Re: Jackson/Liberty Ranch

Gentlemen:

In accordance with your recent request, I have personally inspected and appraised the 21,440 acre Liberty Ranch located in the Tulare Lake area of Kings County, California. Effective date of valuation is June of 1988, and all personal property and growing crops have been excluded from the appraisal.

The purpose of the appraisal was to

estimate the market value of the subject property; said value to be used in connection with litigation between Donald L. Jackson and the Western Farm Credit Bank.

In considered opinion the market value of the above described property as of June of 1988 is the sum of:

Land Value	$7,650,000.
Improvements	100,000.
	$7,750,000.

It is to be noted the attached appraisal report is of limited scope because complete description, data and analysis has been left out for the sake of brevity per your request.

Thank you for this opportunity of service.

Very truly yours,

ROBERT B. WILSON & ASSOCIATES

Charles W. Puckett, MAI

CWP/gtg
attach.

APPRAISAL REPORT

I Identification of Property

The subject property under appraisement is the 21,440 acre Liberty Ranch located in the Tulare Lake area of Kings County, California. Included in the appraisal is the land, improvements and irrigation system; excluded is all personal property and growing crops.

The purpose of the appraisal is to estimate the market value of the subject property; said value to be used in connection with contemplated litigation.

Market value is defined as: "The most probable price in terms of money which a property should bring in a competitive and open

market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus."

Effective date of valuation is June 1988.

II Property Ownership

Defendants: Farm Credit Admin.
(Owners) Western Farm Credit Bank

Plaintiffs: Donald L. Jackson &
(former Patricia V. Jackson
owners) dba Victory Farms

III Legal Description

No legals furnished the appraisers so the property is generally described as:

Por. of Sections 13, 24, 25, 26, 35 & 36, T 23S, R 20E

Por. of Sections 5, 6, 7 & 8 T 23S, R 22E

Por. of Sections 2, 3, 10 & 11 T 24S, R 20E

All in MDB & M, Kings County, California

IV Assessed Valuies & Taxes

There are many APN for the ranch, however, the total 1987-88 property taxes are about $247,808. which are very high based on Proposition 13 one per cent of market limitation. It is suggested the property owners consult with the Kings County Assessor regarding these high assessments.

V Area Description

The Tulare Lake area is a large flat basin of about 200,000 acres

Area Description -continued-

formed over many years by the flooding of the Kings, Kaweah, Tule and Kern Rivers and several other streams.

Farming in the lake botto began in the early 1900s by pioneers who constructed levees and canals to protect and irrigate their land. Construction of dams on the four rivers by the Corps of Engineers has reduced lake flooding except in the very wet years.

Topography of the lake bottom is flat with an elevation of 180 to 200 ft above sea level. There is no natural drainage out of the Tulare Lake Basin.

Area Description -continued-
Soils in the lake bottom are mostly Tulare clay which is a dark grey heavy gumbo type which is fairly uniform and very productive of certain field crops. This uniform basin type soil is ideal for large corporation farming operations. There is an alkali/ salt problem complicated by a high perched water table along the fringes of the Tulare Lake Basin.

Irrigation water is provided by the Tulare Lake Basin Water Storage District which has certain water rights on the various rivers/streams along with a water contract with the State of California. Most large farmers in

Area Description -continued-
the area also have their own water rights and well fields.

Cotton has been the No. 1 crop in the Tulare Lake area with an average production of 2-2-1/2 bales/acre. The typical cropping pattern in the lake area including annual water requirements (1981 study) are as follows:

Crop	Acreage	A.F./ Ac.	TOTAL Ac. Ft.
Cotton	85,000	2.5	212,500
Wheat	18,000	2.0	36,000
Barley	20,000	1.5	30,000
Safflower	29,000	1.3	37,700
Seed Alfalfa	17,000	2.2	37,400
Misc.	1,000	2.2	2,200
	170,000	2.1	355,800

Area Description -continued-

Lack of drainage and the accumulation of salts continues to be major problems in the lake basin. The Tulare Lake Drainage District was organized to collect and dispose of these brackish waters. Drainage fees are $10.10/acre for undrained land and $29.70/acre for drained land.

VI Property Description

For many years the 21,440 acre Liberty Ranch and the 10,395 acre White Ranch (in Tulare County) were owned and operated by South Lake Farms (Producers Cotton Oil Co.). In 1981, the ranches were sold separately although the irrigation system remains a joint operation.

Property Description -continued-

The Liberty Ranch is located at Utica Avenue and 10th Avenue which is 10 miles south and 4 miles west of Corcoran and is along the southerly edge of the Tulare Lake Basin.

Only 19,826 (gross) acres are level for irrigation because 640 acres are used for evaporation ponds and 974 acres (SW cor. of ranch) are undeveloped grazing land. Ten sections (6,400 acres) of the ranch are rated aerage land, 10,700 acres are rated fair (marginal) land and 2,726 acres are rated poor (submarginal) land. The ratings are shown on the Ranch Map and are summarized as follows:

Property Description -continued-

A	-	Average Land	6,400 acres
F	-	Fair Land	10,700 "
P	-	Poor Land	2,726 "
		Ponds & Grazing	1,614 "
			21,440 acres

Crop production on the ranch has been marginal due to the excess of alkali/salt and high water table.

Soils on the Liberty Ranch are classed mostly as Tulare clay with various amounts of alkali and salt. This appraiser has used the old 1946 Soil Map because the new 1986 soil map was found to e unreliable in the ratings of Tulare Lake soils.

Irrigation water is provided by

Property Description -continued- the Angiola Water District which conforms to the South Lake Farms Liberty Ranch and White Ranch (total 32,000 ± acres). The average supply provided from each source was as follows:

	Acre Feet/Year
Kings River	10,000
Tule River & Deer Creek	1,000
Tulare Lake Flood Waters	8,000
State Water Project	13,000
Well Field (30 wells)	30,000
	62,000

Total irrigated land for the two ranches of 30,000 acres indicates an average water use of 2 acre feet per acre at an average cost

Property Description -continued-

of about $26.00/ac. ft. For more details refer to the report dated May 1987 by Stanley M. Barnes.

Irrigation water on the Liberty Ranch is transported by open ditch and must be pumped out on the land for flood/furrow irrigation.

The well field is located partly on undeveloped land east of Highway 43 and partly on the White Ranch all in Tulare County. The Liberty Ranch is entitled to 2/3 of the water and the White Ranch is entitled to 1/3.

There is a high perched water table in this area of the Tulare Lake Basin. In 1981-1982 drainage

Property Description -continued- lines were installed on 17 sections of the Liberty Ranch and 640 acres were converted into evaporation ponds. These ponds take care of 2/3 of the ranch drainage and 1/3 going into the Tulare Lake Drainage facilities. Crop production is expected to remain marginal until this drainage problem on the Liberty Ranch is solved.

Building improvements included the following, located at the SW corner of Utica and 10th Avenue:

Office - build 1953 ±, concrete block construction, concrete floors, comp. roofing, air conditioned, contains 2,000 S.F. and includes 50 ton truck scale.

Property Description -continued-

Average condition.

Shop/Office - Build 1980 ±, steel frame w/cor. iron exterior heavy concrete floor and includes 10 ton overhead crane. Block office w/rest rooms. Entire building contains 5,000 S.F. and is in only fair condition (for its age).

2 Houses - built 1953 ±, concrete block construction, concrete floors, comp. roofing and each contains 900 S.F. and both are in average condition.

House - built 1938 ±, adobe walls, concrete floors, wood shake roof, contains 1,200 S.F and is in fair condition.

Property Description -continued-

Other improvements, including the old adobe office, old shop and misc. metal buildings have no contributory value ot the ranch.

VII Property Valuation

Liberty Ranch has been a marginal operation in "good times" and a submarginal operation in "bad times". However, the highest and best use of the property would be its continued agricultural use for the growing of sale tolerant field crops.

In the appraisal process only the Market Data Approach to value will be considered because the Income Approach and Replacement Cost Approach would not be applicable

Property Valuation -continued-

in the case of an agricultural property.

The ranch is located near the south end of the Tulare Lake Basin where there are a few large farming operations and very few land sales. Sales research has turned up 2 good comparables in the immediate area, 3 sales in the Dudley Ridge - Devils Den area of Kings-Kern Counties and one good size ranch sale in Madera County that tends to shed light on the market value of the subject property.

A brief sales analysis of the comparables follows:

Sale A of the subject Liberty

Property Valuation -continued-

Ranch that was in escrow in 7/88 but did not close because of legal problems. The 21,440 acres was to have sold for $8,000,000 including $100,000. in building improvements indicating a land value of $368./acre.

Sale B of the nearby White Ranch of 10,395 acres that sold 12/88 for $5,500, 000. or $529./acre. The White Ranch has superior soils (much less marginal land) indicating (529 ÷ 1.5) $353./acre for the Liberty Ranch.

Sale C of 18,000 acres in the Dudley Ridge area of Kings and Kern Counties sold for $30,000,000. cash. A breakdown of the sale is

Property Valuation -continued-

as follows:

Improvements & Equipment	=	$ 3,885,000.
Total trees 4,400 acres @ $4,340.	=	$19,100,000.
Good land 4,250 acres @ $ 750.	=	$ 3,187,500.
Fair land 5,950 acres @ $ 500	=	$ 2,975,000.
Poor land 3,400 acres @ $ 250.	=	$ 852,500.
13,600 $(515.)		$ 7,015,000.
Total Ranch, 18,000 acres		$30,000,000.

The Dudley Ridge Ranch has much superior soils but higher water costs than the Liberty Ranch.

Sale D of the 8,454 acre Devils

Property Valuation -continued-

Den Ranch that sold 10/88 for $5,000,000. cash or $591./acre. Ranch was purchased for the water rights to be taken to the L.A. area. Soils are superior but the water is more expensive than Liberty Ranch.

Sale E of 2,044 acres of grazing land in southern Kings County at $123,000. or $60./acre. This land is considered inferior to the ponding/grazing land of the Liberty Ranch.

Sale F of the 11,600 acre Gravelly Ford Ranch in western Madera County that sold 7/88 for $6,800,000. cash including improvements valued at $1,760,000.

Property Valuation -continued-

indicating $434./acre for the land only.

This property is far superior to the Liberty Ranch in all respects.

Analysis of the above comparables indicate the following unit values for the 21,440 acre Liberty Ranch:

Best Land on Ranch 6,400 acres @ $500.	=	$3,200,000.
Marginal Farm Land 10,700 acres @ $350.	=	$3,745,000.
Submarginal Farmland 2,726 acres @ $200.	=	545,200.
Ponds & Grazing Land 1,614 acres @ $100.	=	161,400.
21,440 ($356.85)		$7,651,600.
Say		$7,650,000.

Property Valuation -continued-

The contributory value of the building improvements are estimated as follows:

	S.F. Area	Unit Value	Value
Office & Scale	2,000	$15.00	$ 30,000.
Shop/ Office	5,000	8.00	40,000.
2 Houses	1,800	10.00	18,000.
Adobe House	1,200	10.00	$ 12,000.
Total Contributory Value			$100,000.

The total Market value of the Liberty Ranch is the sum of:

Land Value	$ 7,650,000.
Improvements	100,000.
	$ 7,750,000.

CONTINGENT AND LIMITING CONDITIONS

The certification of the Appraiser appearing in the appraisal report is

subject to the following conditions and to such other specific and limiting conditions as are set forth by the Appraiser in the report:

1. The Appraiser assumes no responsibility for matters of a legal nature affecting the property appraised or the title thereto, nor does the Appraiser render any opinion as to the title, which is assumed to be good and marketable. The property is appraised as though under responsible ownership and/or competent management.

2. Any sketch in the report may show approximate dimensions and is included to assist the reader in visualizing the property. The Appraiser has made no survey of

the property.

3. The Appraiser is not required to give testimony or appear in court because of having made the appraisal with reference to the property in question, unless arrangements have been previously made therefor.

4. The appraisal is only valid for the intended purpose and date of valuation as outlined in the covering letter.

5. The Appraiser assumes that there are no hidden or unapparent conditions of the property, subsoil or structures, which would render it more or less valuable. The Appraiser assumes no responsibility for such conditions or

for engineering which might be required to discover such factors.

6. Information, estimates and opinions furnished to the Appraiser and contained in the report were obtained from sources considered reliable and believed to be true and correct. However, no responsibility for accuracy of such items can be assumed by the Appraiser.

7. The analysis, opinions and conclusions in the report are confidential and no right of reproduction or reference thereto without written consent of the appraiser and client is permitted.

8. On all appraisals, subject to

satisfactory completion, repairs or alterations, the appraisal report and value conclusion are contingent upon completion of the improvements in a workmanlike manner.

9. Unless otherwise stated in this report, the existence of hazardous material, which may or may not be present on the property, was not observed by the appraiser. The appraiser has no knowledge of the existence of such materials on or in the property. The appraiser, however, is not qualified to detect such substances. The presence of substances such as asbestos, urea-fomaldehyde foam insulation, or other potentially

hazardous materials may affect the value of the property. The value estimate is predicated on the assumption that there is no such material on or in the property that would cause a loss in value. No responsibility is assumed for any such conditions, or for any expertise or engineering knowledge required to discover them. The client is urged to retain an expert in this field, if desired.

CERTIFICATION

I, the undersigned appraiser, do hereby certify that to the best of my knowledge and belief the statements contained in this report, upon which the analyses, opinions and conclusions expressed herein are based, are true and correct; that this report sets forth all of the limiting conditions affecting the analyses, opinions and conclusions contained in this report; that this report has been made in conformity with and is subject to the requirements of the Code of Ethics and Standards of Professional Conduct of the American Institute of Real Estate Appraisers of the National Association of Real Estate Boards.

I further certify that I have no present or contemplated future interest

in the property appraised; that I have no personal interest or bias with respect to the subject matter or the parties involved in the appraisal; that no one other than the undersigned prepared the analyses, conclusions and opinions concerning real estate set forth in this report; and that neither the fee or employment for this assignment was contingent upon the values reported herein.

The American Institute of Real Estate Appraisers conducts a voluntary program of continuing education for its designated members. MAIs and RMs who meet the minimum standards of this program are awarded periodic educational certification.

I am currently certified.

Charles W. Puckett, MAI

Dated: 8-18-89

QUALIFICATIONS OF CHARLES W. PUCKETT

Education Graduated from College of Sequoias with Engineering and Architecture Major in 1949. One year post graduate work in Building Trades Program.

Attended and passed the American Institute of Real Estate Appraisers Courses:

I Appraisal Principals, 1957, U.C., Berkeley

II Urban Properties, 1958, U.C., Berkeley

III Rural Properties, 1956, U.C., Davis

IV Condemnation, 1964, U. of San Francisco.

Attended and passed University of California Extension Courses: Real Estate Practice, Real Estate Law, Real Estate Finance, Residential Appraisal Commercial Appraisal, Rural Appraisal, Tax Aspects and Economics.

Experience Associated with Kings County Assessor's Office from 1951 - 1965, Title of Chief Appraiser.

Associated with Robert B. Wilson & Associates from 1965 - date, Independent Fee Appraiser.

Appraisal experience in:

Residential - Subdivisions, Apartments, condominiums

Commercial - Shopping Centers, Office Buildings, Motels, Restaurants, Drive-Ins

Industrial - Manufacturing Plants, Cotton Gins, Warehouses, Wineries, Packing Plants, Grain Elevators, Cold Storage Plants.

Agriculture - Field Crops, Vineyards, Orchards, Grazing Land, Irrigation Systems, Water Rights, Excess Lands

Special Purpose - Mineral Rights, Leasehold Interests, Recreation Land, Sand & Gravel Pits, Rights of Way,

Going Concern, Good Will

Court Experience — Qualified as expert witness in Superior Court of Kings, Fresno, Tulare, Madera & San Luis Obispo Counties - State Board of Equalization Tax Hearings - Federal District Court and Federal Bankruptcy Court.

Member — American Institute of Real Estate Appraisers - MAI

APPENDIX I

STEVEN R. HRDLICKA, #11755
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UNITED STATES DISTRICT COURT

THE EASTERN DISTRICT OF CALIFORNIA

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DONALD L. JACKSON and PATRICIA V. JACKSON, individually and dba VICTORY FARMS, Plaintiffs, vs. FARM CREDIT ADMINISTRATION; WESTERN FARM CREDIT BANK, formerly known as FEDERAL LAND BANK ASSOCIATION OF SACRAMENTO; and FEDERAL LAND BANK OF VISALIA, Defendants.	CASE NO. CV-F-88-636 REC JOINT DECLARATION OF DAVID SENTER AND LARRY MITCHELL IN OPPOSITION TO DEFENDANT'S MOTION TO EXPUNGE LIS PENDENS, AND DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT DATE: Sept.5,1989 TIME: 1:30 P.M. PLACE:Courtroom of the Honorable Robert E. Coyle

JACKSON v. FCA, et al. CASE NO.
CV-F-88-636 REC
Jt. Decl.of David Senter & Larry Mitchell/
Opp. Mo. to Expunge

I, David Senter, declare as follows:

1. I am currently the National Director of the American Agriculture Movement. I reside at 4636 34th Street N., Arlington, Virginia 22207. My place of business and employment is at 100 Maryland Avenue N.E., Box 69, Washington, D.C. 20002.

2. I was a family farmer from 1964 to 1979 in Johnson County, Texas. In 1979 I was appointed by Texas Governor Clements to represent the Governor and the State of Texas on agriculture affairs on a permanent basis in Washington, D. C. I represented the State of Texas in that capacity for one year until February of 1980, at which time I became National

Director of the American Agriculture Movement. I have been in the capacity of National Director since February, 1980 to and including the current date.

3. In my capacity as National Director of the American Agriculture Movement, I have been in charge of legislative and political affairs nationwide for the organization since February, 1980. In my capacity as National Director of the American Agriculture Movement, I have been involved in writing the 1981 Farm Bill, the 1985 Farm Bill, the 1987 Agricultural Credit Act, and am now working on the 1990 Farm Bill.

I, Larry Mitchell, declare as follows:

4. I am the National Director of federal and state relations for the American Agriculture Movement. I reside at 223 "A" Street, Basement Apartment,

Washington, D. C. 20002 and my business address is the same as David Senter's, noted above.

5. My background is that of a family farmer in Southern Dallas County Texas until 1988, at which time I commenced full time employment with the national office of American Agriculture Movement in Washington, D. C. Over the past five years, I have held various state and national offices with the American Agriculture Movement and I am currently assisting in writing the 1990 Farm Bill.

6. The balance of this Declaration is offered jointly by Larry Mitchell and David Senter. The Declaration is offered as a joint declaration respecting an interview held with a top official of the Farm Credit Administration on Thursday, August 17, 1989 at the headquarters of

of Farm Credit System, located on Farm Credit Drive, in McLean, Virginia.

7. The American Agriculture Movement is one of the largest farm organizations in Washington, D.C., with offices, representatives and members in 37 states of the United States. We have been particularly interested in the borrower's rights provisions of the Agricultural Credit Act of 1987 because we were instrumental in sponsoring that legislation and assisting in its passage through Congress to become an intrical part of the Agricultural Credit Act of 1987.

8. Since the passage of the Agricultural Credit Act of 1987, our Washington, D. C. office has received numerous inquiries from farmers nationwide respecting their borrower's rights. Many farmers have expressed difficulties with

how their borrower's rights are being administered by Farm Credit System lenders.

9. We are aware of and follow closely, the numerous lawsuits commenced in various states by farmers with grievances respecting their borrower's rights under the 1987 Agricultural Act and we have particularly been made aware of the position by Farm Credit System attorneys that farmers have no right of private action to enforce their borrower's rights in the courts.

10. Since announcement of the Ninth Circuit Harper decision in late June, 1989, inquiries from farmers, including Don Jackson, experiencing problems with Farm Credit System institutions respecting their borrower's rights have intensified. Until recently, we believed that farmers

could have their grievances addressed in one of two ways. First, we understood that a farmer could submit his grievance to the Farm Credit Administration and it would, in effect, enforce the law and insure the farmer his rights. Second, the farmer could directly take the Lender to court.

11. Before the Harper decision in the Ninth Circuit, we were aware that there was a dispute on the issue of allowing a farmer the right to bring an action himself in the courts. We have now been advised by various farmers and attorneys throughout the United States of the impact of the recent Ninth Circuit Harper decision on the borrower's rights provision of the 1987 Agricultural Credit Act. We therefore determined that we had a duty to personally investigate the actual

availability of the Farm Credit Administration administrative process for handling farmers' grievances. We were already working on the development of a Bill that we would sponsor through Congress which would establish an express right of private action which we believe is necessary in order to eliminate the tremendous financial hardship on farmers seeking to enforce their borrower's rights in courts. These farmers are uniformly opposed by Farm Credit System institutions on the theory that farmers have no standing to sue in court to enforce their rights under the 1987 Agricultural Credit Act.

12. We have been under the belief since passage of the 1985 Agricultural Credit Act that the Farm Credit Administration was available and empowered to

respond to farmers' grievances against Farm Credit System entities in regard to the debt restructure provisions of the 1985 Agricultural Credit Act and the entire borrower's rights provisions under the 1987 Agricultural Credit Act. Our belief is shared by the numerous Congressmen and Senators that we are involved with on a daily basis and was perhaps evidenced by the outcome of the Senate Agricultural Subcommittee oversight hearings conducted in July of this year respecting the 1987 Agricultural Credit Act which we attended.

13. For several weeks we have been contacted by farmers who have informed us that the Office of Congressional and Public Affairs Division of Farm Credit Administration had informed them that Farm Credit Administration would not become involved in any disputes between borrowers

and Farm Credit System institutions. We reasoned that if that was, in fact, the case, then based on the Harper decision coupled with Farm Credit Administration's refusal to become involved in borrower disputes with Farm Credit System lenders, the result was that the borrowers' rights provision of the 1987 Agricultural Credit Act would be rendered completely useless and meaningless in that a farmer's rights could not be enforced against Farm Credit System lenders in any form.

14. The borrowers' rights provisions of the 1987 Agricultural Credit Act were designed to benefit both distressed farmers and the financially distressed Farm Credit System by virtue of providing a specific financial vehicle which would assist distressed farmers in staying on their lands and/or reacquiring their

lands, on the one hand, while, on the other hand, alleviating Farm Credit System from the burden of maintaining farm properties that they do not have the expertise or ability to manage and deterring the prospects of Farm Credit System from accumulating additional farmlands through foreclosure proceedings. If the borrower's rights provisions of the 1987 Agricultural Credit Act are honored by lenders, then the result will be equally beneficial to borrower and lender alike.

15. We arranged a meeting with Ron Erickson in the Office of Congressional and Public Affairs at the Farm Credit Administration at their headquarters at 1501 Farm Credit Drive, MacLean, Virginia. We had been informed that Ron Erickson was the party that many farmers had been referred to and that his office was the

office that had been responding in writing to the various farmers with grievances against Farm Credit System. Attached hereto as Exhibit "A" is Mr. Erickson's business card.

16. Our meeting with Ron Erickson occurred at 2:00 p.m. Thursday, August 17, 1989. Our meeting with Ron Erickson was basically an informational meeting during which time we asked various questions and expressed our concerns and Mr. Erickson responded to those questions, in what we would add, a straightforward and forthright manner with no appearance of being evasive. The content of our meeting with Mr. Erickson is best set forward on an inquiry and response basis.

INQUIRY:

Respecting the borrowers' rights provisions of the 1987 Agricultural Credit

Act, is the Farm Credit Administration (hereafter "FCA") only interested in the letter of the law or are they interested in the spirit and intent of the law. In other words, is the FCA concerned with anything beyond how a Farm Credit System lender is shuffling their paperwork.

ERICKSON:

The FCA concerns itself with a little of both. The FCA is charged with examining every Farm Credit System institution every year. The FCA sends out examinational bulletins respecting borrowers' rights to Farm Credit System institutions. The institutions must reply and if the FCA finds an infraction, then there are two enforcement options:

(a) The FCA can send a letter of agreement; or,

(b) They can send a cease and desist order.

The FCA usually does neither unless the FCA discovers a pattern in the offending institution because just one or two incidences in a certain area does not warrant any action and the FCA will not intervene between System institutions and its individual borrowers. The FCA regulates only the System institutions themselves and does not and will not intervene in disputes between borrowers and System institutions respecting alleged violations of borrowers' rights under the 1987 Agricultural Credit Act.

INQUIRY:

We are concerned that there is currently only one acting Governor on the three-man Board of Governors appointed by the President of the United States

which is charged with controlling the entire Farm Credit Administration. We know it can take 6 to 8 months from the time the President names a Governor for the security clearance to be completed and that party can assume the position. We are aware that under Farm Credit Administration Rules and Regulations that a quorum of two of the Board of Governors is required before the FCA can issue any policies and regulations. Accordingly, since there is only one acting Board of Governor member, namely Marvin Duncan, and since the resignation of Mr. Naylor and Mr. Billington with no new appointments to take their place, we are interested in currently how the FCA can effectively regulate Farm Credit System.

ERICKSON:

We are functioning.

INQUIRY:

If the FCA decided to become involved in borrower disputes with Farm Credit System lenders respecting violations of their borrowers' rights under the 1987 Agricultural Credit Act, does the FCA, in fact, have the manpower to deal with the necessary investigations and enforcement requirements.

ERICKSON:

The FCA does not have the time to investigate individual farmers' complaints against Farm Credit System members and even if we were inclined to become involved in investigating individual farmers' complaints, we do not have the manpower to deal with farmers' complaints on a nationwide basis.

INQUIRY:

If there was a determination and/or a directive that the Farm Credit

Administration is, in fact, responsible for dealing with farmers' individual complaints against Farm Credit System institutions, what would be the procedure for those farmers to follow in order to commence an administrative process. In other words, what complaint forms and paperwork is available for the farmers to complete and serve on Farm Credit Administration in order to initiate the administrative process that the courts are relying on as being in existence as they rule that farmers have no right of private action to enforce their borrowers' rights in a court of law.

ERICKSON:

There is no certain paperwork available to individual farmers with complaints against Farm Credit System and there is no procedure for paperwork to be

filed. There are no complaint forms. There is no administrative procedure available to farmers with complaints against Farm Credit System institutions. In response to complaints and inquiries from farmers, what Farm Credit Administration has been doing is to send a form letter back to the complainant suggesting that the complainant send all documentation evidencing the alleged violations as soon as possible. FCA then looks into the complaint and if we see a pattern in the particular Farm Credit System institution involved, then we take the action set forward above. However, the complaining borrower is not notified of the Farm Credit Administration findings and, in fact, if there is a finding by Farm Credit Administration that the borrowers' complaint is valid and that violations have

occurred, that information is not released to the farmer and is not available to the farmer, even under the Freedom of Information Act. Our instruction to the particular lender that we find may have violated a borrowers' rights is not to conduct themselves that way in the future. However, we do not intervene in that particular borrower's dispute with the Farm Credit System lender. The borrower's recourse is in a court of law because the FCA is not available to borrowers to enforce their individual rights against Farm Credit System lenders.

INQUIRY:

If there is a determination by FCA that a Farm Credit System lender has violated a borrower's rights, for example, the right of first refusal to purchase his property and the borrower is in jeopardy

of losing the property unless the offending institution is restrained from disposing of the property, could the FCA issue a cease and desist order to restrain Farm Credit System from disposing of the property and how quickly could the FCA respond to such a request from a borrower if it elected to do so.

ERICKSON:

The FCA will not issue a cease and desist order for a specific borrower in regard to his borrower's rights under the 1987 Agricultural Credit Act. It takes the FCA considerable time to look into the alleged complaints and again the FCA is only interested in a pattern of offenses and is not interested in individual offenses. If the individual borrower is not satisfied with the treatment they are receiving from the Farm Credit System

lender, then they must resort to the courts to solve that problem.

INQUIRY:

Has the FCA developed any specific rules or policies as a guideline for Farm Credit System lenders respecting enforcement of Section 108 of the Agricultural Credit Act as it relates to a former borrower's right of first refusal to reacquire his foreclosed farm property.

ERICKSON:

There are no regulations or guidelines other than those set forward in the FCA Handbook.

INQUIRY:

Does the National Assets Council division of the FCA have authority to investigate debt restructuring and, if so, how many debt restructuring decisions have they investigated and how many debt

restructuring decisions have they determined to be in error.

ERICKSON:

Every Farm Credit System institution that is receiving financial assistance must set up a District Special Assets Council. The National Council then does spot checks on a random basis on the District Special Assets Councils. The District Special Assets Councils are required to look into every denial of debt restructuring requests that occur within that District and then the National Council simply spotchecks on a random basis at the District level. I have no statistics for you regarding the number spot checked by the National Assets Council or regarding how many decisions were found to be in error.

INQUIRY:

Based on information received from the National Assets Council respecting debt restructuring under the 1987 Agricultural Credit Act, does the FCA prepare a report to Congress and, if so, how often has the FCA reported and where can we obtain copies of the report.

ERICKSON:

The FCA will shortly be giving a report to Congress respecting debt restructuring under the 1987 Act. The report will have a special section on first-time borrowers, young farmers. In regard to reporting on how many debt restructuring complaints, investigations of debt restructure violations, etc., this is not a matter that will be included in the report to Congress and the FCA is not currently required to report on those matters.

INQUIRY:

Does the Administrative Procedures Act equally apply to Farm Credit Administration and Farm Credit System financial institutions such that farmers can avail themselves of a formal administrative process in regard to any grievances they have against Farm Credit System lenders.

ERICKSON:

Farm Credit Administration is a federal agency and therefore is subject to the Federal Administrative Procedures Act. However, Farm Credit System institutions are private institutions and as such borrowers with grievances against their lender must resort to courts of law to address their grievances against Farm Credit System lenders. Just because Farm Credit System financial institutions are regulated by a federal agency does not

mean they are not a private institution, the same as federally chartered banks that are regulated by federal bank regulators. Furthermore, financial institutions that are receiving federal assistance can still be private institutions. That is why farmers with grievances against Farm Credit System lenders have the courts available to address their grievances as opposed to a federal administrative process. The FCA has jurisdiction to regulate Farm Credit System financial institutions but the primary function of the FCA is to audit the books and financial statements of Farm Credit System institutions in order to assure that they are financially sound as a prerequisite to approval of Farm Credit System's financial requests.

INQUIRY: The recent Ninth Circuit ruling in the Harper case holds that farmers do not have an implied right to sue Farm Credit System lenders alleged to be violating their borrowers' rights under the 1987 Agricultural Credit Act. If the FCA takes the position that it will not step in and address individual grievances from farmers respecting violations of their borrowers' rights under the 1987 Agricultural Credit Act on the theory that farmers must enforce their rights in a court of law, then doesn't the Harper case, in effect, render the borrower's rights of the 1987 Agricultural Credit Act unenforceable and meaningless.

ERICKSON: The Harper decision is just one case and the law is quite explicit that farmers do have the right to sue individual

financial institutions alleged to be violating their rights. Borrowers will have to avail themselves of the court processes in order to enforce their borrowers' rights because the FCA will not intervene in disputes between individual borrowers and their Farm Credit System lender.

17. The meeting was then concluded and we relayed the information we received from the meeting to our various state offices for dissemination to the farming committee. The information we received from the meeting was completely consistent with the FCA position as stated in written correspondence to farmers we have reviewed, such the August 3, 1989 letter to Donald Jackson from FCA, attached as Exhibit "B". We both concluded from the meeting that the FCA is not currently available as an

alternative to the courts for farmers with individual complaints respecting violation of their borrowers' rights under the 1987 Agricultural Credit Act.

We declare under penalty of perjury under the laws of the State of California and District of Columbia, that the foregoing is true and correct, and that this Declaration is executed on this _____ day of August, 1989, at Washington, D. C.

_____
DAVID SENTER

_____
LARRY MITCHELL

(Jackson/7)

FCA
Farm Credit Administration

RON ERICKSON
Office of Congressional &
Public Affairs
Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 2210-5090
Office (703) 883-4058
(703) 883-4113
Home (703) 534-3413

Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5090
(703) 883-4000

August 2, 1989

Mr. and Mrs. Donald L. Jackson
P. O. Box 126
Traver, CA. 93673

Dear Mr. and Mrs. Jackson:

This is in response to your letter to Victor A. Cohen, senior attorney, Office of General Counsel, Farm Credit Administration (FCA).

The FCA is the Federal agency responsible for the regulation and examination of the institutions of the Farm Credit System, including the Western Farm Credit Bank and its affiliated associations. The agency promulgates regulations to implement the Farm Credit Act of 1971, as amended, and examines

the institutions under its jurisdiction for compliance with the statute, regulations, and safe and sound banking practices. Reports of examination are presented to the boards of directors of these institutions orally and in writing. If violations of the statute or regulations are revealed or if the institutions are being operated in an unsafe or unsound manner, the agency has several enforcement options at its disposal. These include formal agreements, cease and desist orders, civil money penalties, and the removal of officers and directors. A review of compliance with the borrower rights provisions of the statute is included in each examination. The FCA, however, does not intervene in disputes between the institutions under its jurisdiction

and their borrowers.

We will bring your complaint to the attention of our examination staff for consideration in the next regularly scheduled examinations of the Western Farm Credit Bank and the Federal Land Bank Association of Visalia.

Sincerely,

Francis J. Boyd, Jr., Director
Office of Congressional & Public
Affairs

APPENDIX J

UNITED STATES SENATE
Washington, DC 20510

David Pryor, Arkansas

Russell Senate Office Building
Washington, DC 20510
(202) 224 2353

Arkansas Office
3030 Federal Building
Little Rock, AR 72201
(501) 378-6336

Committees
Agriculture, Nutrition and Forestry
Finance
Governmental Affairs
Special Committee on Aging
Select Committee on Ethics

The Honorable Harold B. Steele
Chairman, Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5090

Dear Harold:

We are writing to raise an issue of cirtical importance regarding the enforcement of loan restructuring and other rights of farmer members of the

Farm Credit System. Two major court rulings on the question of whether Farm Credit System borrowers have a private right of action to enforce borrower rights and other restructuring provisions of the Agricultural Credit Act of 1987 are in conflict. The Zajac case in the 8th District upholds while the Harper case in the 9th District expressly rejects System borrowers private right of action. We understand that it could take several years for the Supreme Court to resolve these conflicting opinions. In the interim, borrowers of System institutions in some districts will not enjoy the same rights as System borrowers in other districts. This is clearly not what Congress intended when it passed the Agricultural Credit Act of 1987.

We would be grateful for your thoughts on what role the Farm Credit Administration can and should take in resolving this problem. We would also appreciate your thoughts on what legislative remedy may be appropriate for ensuring that Farm Credit System borrowers throughout the nation are afforded equitable treatment.

Thank you for your consideration.

Sincerely,

David Pryor

David Boren

Mitch McConnell

APPENDIX K

UNITED STATES SENATE

Committee On The Judiciary

Washington, DC 208 10-6275

December 22, 1989

Joseph R. Biden, Jr., Delaware, Chairman

Edward M. Kennedy, Massachusetts
Howard M. Metzenbaum, Ohio
Dennis DeConcini, Arizona
Patrick J. Leahy, Vermont
Howell Heflin, Alabama
Paul Simon, Illinois
Herbert Kohl, Wisconsin
Strom Thurmond, South Carolina
Orrin G. Hatch, Utah
Alan K. Simpson, Wyoming
Charles E. Grassley, Iowa
Arlen Specter, Pennsylvania
Gordon J. Humphrey, New Hampshire

Mark M. Gittenstein, Chief Counsel
Diana Huffman, Staff Director
Terry L. Wooten, Minority Chief Counsel
R. J. Duke SHort, Minority Staff Director

Mr. Harold Steele
Chairman, Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102

Dear Mr. Steele:

As you know, conflicting court decisions on borrowers' private cause of action against the Farm Credit System have caused much confusion regarding borrowers' appeal rights. While the Eighth District upheld borrowers' rights to bring suit against Farm Credit System institutions, the Ninth District contended that borrowers' must instead utilize administrative procedures for remedies in complaints with Farm Credit System institutions.

While I understand the discrepancy between the court decisions must be resolved by the United States Supreme Court, I believe that farmers should not be deprived of their appeal rights while awaiting that decision. Additionally, farmers should not be limited to costly

judicial processes to receive fair hearings in complaints against System lenders. Indeed, the Ninth Circuit Court based the Harper decision on the premise that the FCA has enforcement powers for violations of borrowers' rights.

I understand the Farm Credit Administration's current policy is to not act on individual cases, regardless of revelations during institution examinations. As you know, however, borrowers in the Ninth Circuit are presently denied due process through the courts. Further, court processes in any district are costly for borrowers, whose financial resources are significantly limited relative to FCS lenders. Therefore, I urge you to alter FCA policy and to provide farm borrowers their due process

rights through the administrative process. Since it would be necessary for your agency to develop procedures to implement a hearing process, I urge you to adopt this policy change as swiftly as possible.

I look foward to your response on this matter.

Sincerely,

Charles E. Grassley
United States Senator

CEG/cdo

APPENDIX L

101ST CONGRESS
1ST SESSION

H. R. 4732

IN THE HOUSE OF REPRESENTATIVES

Mr. NAGLE introduced the following bill; which was referred to the committee on _____

A BILL

To amend the Farm Credit Act of 1971 to allow borrowers to bring actions against institutions of the Farm Credit System in the Federal Courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RIGHT OF ACTION.

(a) IN GENERAL. --Part C of title IV of the Farm Credit Act of 1971 (12

U.S.C. 2201 et seq.) is amended by inserting after the section transferred by section 2 of this Act the following:

SEC. 4.14G. BORROWERS RIGHT OF ACTION.

(a) IN GENERAL. --Any person (other than a System institution) who is or will be directly and adversely affected by conduct of any System institution which is inconsistent with the conduct required of such institution by or under this Act may bring an action againt such institution in any United States district court, without regard to the amount in controversy.

(b) AVAILABILITY OF INJUNCTIVE RELIEF. --Upon a proper showing that a System institution has engaged, is engaged, or is about to engage in conduct which is inconsistent with the

conduct required of such institution by or under this Act, the court may--

(1) restrain such conduct by issuing a temporary restraining order or a preliminary or permanent injunction; and

(2) issue an order requiring the institution to engage in the required conduct.

(c) DAMAGES. --The court shall award any person prevailing in an action brought under subsection (a) with respect to conduct an amount equal to the greater of--

(1) the actual and consequential damages suffered, and reasonable attorney's fees incurred, by the person by reason of such conduct; or

(2) $1,000.

(d) SYSTEM INSTITUTION DEFINED. --As used in this section the term "System institution" means--

(1) any bank or association of the Farm Credit System; and

(2) any service organization chartered under part E of title IV.

(e) CONCURRENT JURISDICTION WITH STATE COURTS. --The United States district courts and the State courts of competent jurisdiction shall have concurrent jurisdiction over any action brought under subsection (a).

(b) EFFECTIVE DATE. --The amendment made by subsection (a) shall apply to conduct engaged in after January 6, 1988, whether or not such conduct is

the subject of an action pending in a court of the United States on the date of the enactment of this Act.

SEC. 2. CONFORMING TRANSFERS AND AMENDMENTS RELATED TO BORROWERS' RIGHTS.

(a) TRANSFER AND REDESIGNATION OF SECTION 4.36.--

(1) IN GENERAL. --Section 4.36 of the Farm Credit Act of 1971 (12 U.S.C. 2219a) is transferred to part C of title IV of such Act, inserted in such part immediately after section 4.14E, and redesignated as section 4.14F.

(2) CONFORMING ADMENTMENTS. --Section 8.9 of such Act (12 U.S.C. 2279aa-9) is amended by

striking 4.36 each place such term appears and inserting 4.14F.

(b) REDESIGNATION OF SUCCEEDING SECTIONS OF PART G OF TITLE IV. --Sections 4.37, 4.38, and 4.39 of such Act (12 U.S.C. 2219b, 2219c, and 2219d) are redesignated as section 4.36, 4.37, and 4.38, respectively.

APPENDIX M

TITLE 4.5

RECORDING NOTICE OF CERTAIN ACTIONS

§409. Filing Lis Pendens or Notice of Action With Recorder.

(a) In an action concerning real property or affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing a cross-complaint, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or cross-action, and a description of the property in that county affected

thereby. This section authorizes a notice of an action concerning real property pending in any United States district court to be recorded and indexed in the same manner and in the same place as herein provided with respect to notices of action pending in courts of this state. From the time of filing the notice for record only, a purchaser or encumbrancer of the property affected thereby shall be deemed to have constructive notice of the pendency of the action as it relates to the real property and only of its pendency against parties designated by their real names.

(b) In an action concerning real property or affecting the title or the right of possession of real property,

the clerk, or the judge if there is no clerk, shall issue a notice of pendency of action to a party requesting it, or an attorney of record in the action may sign and issue a notice of pendency of action, or the person causing the notice of the pendency of the action to be recorded may obtain certification from the court in which the action is pending that an action concerning real property or affecting the title or the right of possession of real property has been filed between the named parties. A notice of pendency of action may not be recorded, except by a public agency bringing an action in eminent domain pursuant to Title 7 (commencing with Section 1230.101) of Part 3, unless it is issued by the court, or issued by the attorney of

record in the action or proceeding, or accompanied by a certified copy of the certification. The fee for issuance of the notice of pendency of action by the court, or making the certification, shall be as specified in Section 26836 of the Government Code.

(c) Except in actions brought under Title 7 (commencement with Section 1230.010) of Part 3, the person causing the notice of the pendency of the action to be recorded shall first cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested to all known addresses of the adverse parties and to all owners of record as shown by the latest county assessment roll or more recent assessment information in

the possession of the county assessor. A copy of the notice of the pendency of the action shall also be filed with the court in which the lawsuit is filed. Service shall also be made immediately upon each adverse party who is later brought into the action pursuant to Section 385, 387, 389, 472, 472a, 473, 474, 576, or any other provision of law.

(d) Any notice of the pendency of the action recorded pursuant to subdivision (a) shall be void and invalid as to any adverse party or owner of record, unless the requirements of subdivision (c) are met for the party or owner, and a proof of service, as set forth in Section 1013a, has been recorded with the notice of the pendency of the action. If there is no known

known address for service on an adverse party or owner as required under subdivision (c), then as to that party a declaration under penalty of perjury to that effect shall be recorded instead of the proof of service described above, and the service on that party shall not be required.

§409.1. Requirements to Expunge Notice of Pendency of an Action.

At any time after notice of pendency of an action has been recorded pursuant to Section 409 or other law, the court in which teh action is pending shall, upon motion of a party to the action supported by affidavit, order that the notice be expunged, unless the party filing the notice shows to the satisfaction of the court,

by a preponderance of the evidence that:

(a) The action does affect title to or right of possession of the real property described in the notice; and

(b) Insofar as the action affects title to or right of possession of the real property described in the notice, the party recording the notice has commenced or prosecuted the action for a proper purpose and in good faith. Notice of motion to expunge shall be served not less than 20 days prior to the hearing. The court shall determine the matter on the affidavits and counteraffidavits on file and upon such other proof as the court may permit. Upon recordation of a certified copy of the order expunging a notice of

pendency of the action in the office of the county recorder in which the notice of the pendency of the action was recorded neither the notice of the pendency of the action nor any information derived therefrom, prior to the recording of a certified copy of the judgment or decree issued therein, shall constitute constructive or actual notice of any of the matters contained therein, or of any of the matters relating to such action, or create any duty of inquiry in any person thereafter dealing with the property described therein.

The court, as a condition of granting or denying the motion to expunge, may require that the party prevailing upon such motion give the other party an undertaking of such

nature, and in such amount as shall be fixed by the court, such undertaking to be to the effect that such prevailing party will indemnify the other party for all damages which he may incur if he ultimately prevails in the action.

§409.2. Undertaking of Moving Party for Damages If Moving Party Does Not Prevail.

At any time after notice of pendency of an action has been recorded pursuant to Section 409 or other law, the court in which the action is pending may order that the notice be expunged if the moving party shall have given an undertaking of such nature, in such amount and within such time as shall be fixed by the court after notice and hearing, such undertaking to

be the effect that the moving party will indemnify the party recording the notice for all damages which he may incur if the notice for all damages whcih he may incur if the notice is expunged and the moving party does not prevail and if the court finds that adequate relief can be secured to the party recording the notice by the giving of such undertaking. Upon recordation of a certified copy of such order in the office of the county recorder in which the notice of the pendency of the action was recorded neither the notice of the pendency of the action nor any information derived therefrom, prior to the recording of a certified copy of the judgment or decree issued therein, shall constitute constructive or actual notice of any of

the matters contained therein, or of any of the matters relating to such action, or create any duty of inquiry in any person thereafter dealing with the property described therein.

§409.4. Writ of Mandate to Review Order Granting or Denying Motion to Expunge Notice of Pendency of Action.

An order granting or denying a motion to expunge a notice of pendency of action made pursuant to Section 409.1 or 409.2 shall not be appealable. When that order is made, the party aggrieved by that order may, within the time hereinafter provided, petition the proper reviewing court to review the order by writ of mandate. The petition for writ of mandate [1] shall be filed within 20 days after service of written

notice of the order [2]. However, the superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days. A copy of the petition for writ of mandate shall be delivered to the clerk of the trial court with a request that it be placed in the trial court file.